



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**

**Civil Suit 927 of 2009**

**AFRICAN LEATHER LIMITED ..... PLAINTIFF**

**VERSUS**

**INTER REGION HIDES & SKINS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**JORAM MAINA GACHUGU ..... 2<sup>ND</sup> DEFENDANT**

**DAMARIS WANGUI MAINA ..... 3<sup>RD</sup> DEFENDANT**

**R U L I N G**

By a Notice of Motion dated 16<sup>th</sup> March, 2012, the Defendants have applied to this court under Section 1A and 3A of the Civil Procedure Act and Order 22 Rule 6 and Rule 22 of the Civil Procedure Rules for the setting aside of the exparte judgment and the decree arising therefrom. The Defendants have also sought leave to file their Statements of Defence within seven (7) days. That application was supported by the Affidavit of Damaris Wangui Maina sworn on 16<sup>th</sup> March, 2012.

In the Affidavit, Damaris Wangui contended that the Defendants became aware of the suit upon the arrest and apprehension of the 2<sup>nd</sup> Defendant vide the warrant of arrest, that the Defendants were conveniently not afforded the appropriate notices to inform them of the subsistence of this suit, that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were being tried for the same cause of action in the Chief Magistrates Court, Kibera and therefore the incarceration of the 2<sup>nd</sup> Defendant was mala fides, that the Defendants were ready to pay the debt if this court found them liable, that the suit was bad in law since the cheques in issue were issued by the 1<sup>st</sup> Defendant which was separate legal entity and that the Defendants have a good defence which they should be allowed to present.

In the written submissions it was contended for the Defendants that they had disputed service of the summons, that the joinder of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the suit was contrary to law and reliance was

placed in the cases of **National Bank of Kenya Ltd –vs- First Interstate Trading Co. Ltd & 2 others (2005) e KLR**, and **Bachoo Patel Ta K. G. Patel shop Ltd –vs- Stanley George Wamutira (2010) e KLR**. It was further submitted that the 2<sup>nd</sup> Defendant had been charged in Criminal case No. 5457 of 2010 at Kibera Chief Magistrates Court with obtaining money by false pretenses and would be wrong to commit the 2<sup>nd</sup> Defendant to Civil jail for civil debt, the case of **In the Matter of Zipporah Wambui Mathara (2010) e KLR** was relied on. Finally, it was submitted that the mandatory ten (10) day notice was never issued as required under Order 22 Rule 6 and the process of execution was therefore fundamentally flawed.

The Plaintiff opposed the application by filing a Replying Affidavit of Praful Shah and written submissions. The Plaintiff contended that before the suit was filed the Defendants were served with a demand letter, that they were also served with the summons and notice of entry of judgment, that the 2<sup>nd</sup> Defendant sent one Robert Njoka Muthara to negotiate a settlement whereby in a meeting held on 5<sup>th</sup> March, 2010 the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants requested for three (3) months to be able to dispose off certain lands and settle the claim; that the 2<sup>nd</sup> Defendant was arrested at Wimpy Food court 1<sup>st</sup> floor Sarit Centre – Westlands and not in Court as had been contended by the Defendants, that it was only the 2<sup>nd</sup> Defendant being tried at the Kibera Law Courts and not with the 1<sup>st</sup> Defendant as had been alleged and that the cheques by the Plaintiff were issued in the name of the 2<sup>nd</sup> Defendant, whilst the cheques for repayment were drawn on the 1<sup>st</sup> Defendant.

It was submitted for the Defendants, inter alia, that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant had not authorized the 3<sup>rd</sup> Defendant to swear the affidavit on their behalf and that therefore the application should be dismissed, that the suit was properly brought against all the Defendants and reliance was placed in the case of **Njoka Tanners Ltd & Anor –vs- Paul Kigia Meru HCCA No. 60 of 2009 (UR)**. It was further submitted that there was no defence to the Plaintiff’s claim and that no draft defence was annexed and reliance was placed on the **National Bank of Kenya Ltd –vs- First Interstate Trading Co. (Supra)**. It was further submitted for the Plaintiff that the Defendants were not candid with the court and finally that criminal and civil proceedings can run side by side and the case of **Republic –vs- The Chief Magistrate court exparte George Stuart Wachira NBI Misc appl. No. 480 of 1999 (UR)** was cited in support of that proposition. The Plaintiff urged that the application be dismissed with costs.

I have carefully considered the Affidavits in Support, the written submissions and the authorities relied on. I have also perused the entire record.

This is an application to set aside a judgment in default that was entered on 2<sup>nd</sup> June, 2010. The principles applicable in an application such as this one are well known and were set out by the Court of Appeal in the case of **Njagi Kanyunguti Alias Karingi Kanyunguti & Others – vs - David Njeru Karingi CA No 181 of 1994 (UR)** the court of Appeal held:-

***“In an application brought either under OIXA Rule 10 or O.IXB Rule 8 of the Civil Procedure Rules, the court exercises discretionary jurisdiction. The discretion being judicial is exercised on the basis of evidence and sound legal principles. The court’s discretion is wide, provided it is exercised judicially (see Pithon Waweru Maina –vs- Thuku Mugiria ( Civil Appeal No. 27 of 1982) (unreported), Patel V.E.A Cargo Handling Services Ltd 1974 EA 75). The court is also enjoined to consider all the circumstances of the case, both before and after the judgment being challenged, before coming to a decision whether or not to vacate the judgment.***

.....

***However, it is trite law that this or any other court will only exercise its judicial discretion in favour of setting aside a judgment in order to avoid injustice, or hardship resulting from accident, inadvertence or excusable mistake or errors and will not assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.” (Emphasis mine)***

Accordingly, in considering the present application, the court has a wide discretion which however has to be exercised on the basis of the evidence before it and sound legal principles. Such discretion is to be exercised in order to avoid an injustice or hardship arising from an accident, inadvertence or excusable mistake or error.

The first issue to consider is whether this is a regular judgment or not. If the same is irregular then there is no discretion on the part of the court, the same MUST be set aside ex debito justitiae. However, if it is regular then the Court in exercise of its discretion is enjoined to consider if there is a defence on merit.

In the Affidavit in support of the Motion which was sworn by the 3<sup>rd</sup> Defendant, she alluded to the fact that the Defendants were unaware of the existence of the suit until the 2<sup>nd</sup> Defendant was arrested, that they were conveniently not afforded the appropriate notices of the subsistence of the suit. In the Replying Affidavit, Praful Shah swore that the Defendants were served with the summons, Plaint and Notice of Entry of Judgment that after being served the Defendants engaged the Plaintiff in negotiations brokered by a Mr. Robert Njoka Muthara; that the Defendant asked for there (3) months to settle the claim. All these allegations were never rebutted by the Defendants.

Although the Replying Affidavit of Praful Shah did not produce evidence of service of the summons, I have noted from the record that when applying for the judgment in default, an Affidavit of Service by a process server Julius Muchangi Gaturu was filed in court on 27<sup>th</sup> May, 2010. In that Affidavit, the process server gave a detailed explanation on how he effected service of the summons and plaint upon the Defendants. He swore that on 3<sup>rd</sup> February, 2010 one Justus Kilima took him to Njiru Area along Njiru Mwiki road where the offices/store of the 1<sup>st</sup> Defendant is located, that a worker in the premises informed him that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant were not in, that he called the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants telephone numbers 0722 649 806 and 0722 716 085 and spoke to the two, that they asked him to return later. Mr. Gaturu swore that on the same day at 3.30 p.m., he went back to the premises and served all the three Defendants with the summons and Plaint together with copies of the dishonoured cheques. The Defendants did not sign the said documents because they indicated that they would settle the matter with the Plaintiff.

That service is said to have taken place on 3<sup>rd</sup> February, 2010 and the summons gave the Defendants 15 days to enter appearance. Mr. Praful Shah swore that after the said service, Robert Njoka Muthara went to see him on 24<sup>th</sup> February, 2010 and a meeting was agreed for 5<sup>th</sup> March, 2010 in which the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants requested for three (3) months to settle.

It should be noted that although service is said to have been effected on 3<sup>rd</sup> February, 2010, the Plaintiff waited until 27<sup>th</sup> May, 2010 to request for judgment. The delay may probably be explained by the subsequent meetings of 24<sup>th</sup> February, 2010 and 5<sup>th</sup> March, 2010 alluded to by Praful Shah in his Replying Affidavit.

I am satisfied that the Defendants were properly served with the summons. It is clear that the process server was very detailed in his Affidavit, he even gave the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants mobile numbers. The averments of the process server as to the manner of service as well as those of Praful Shah as to the meetings that took place subsequent to the service were neither denied nor challenged. Accordingly, I find that the Defendants were properly served and the judgment in default is a regular judgment.

Having found that the judgment sought to be set aside is regular in exercising its discretion, the court has to consider if there is a defence to the Plaintiff's claim. In the case of **Patel –vs- EA Cargo Handling Services Ltd (1974) E.A 75** at 76 the court held:-

***“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 it by the rules. I agree that where it is a regular judgment as is the case here the court will not normally set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean, in my view, 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.”***

In my understanding, a serious Defendant who applies to set aside a default judgment should annex to such an application a draft defence to show the court, the issues which the Defendant would like the court to try. In the present application, the Defendants did not annex any such draft defence. I have to rummage through the Supporting Affidavit of Damaris Wangui Maina and the written submissions to ascertain what the Defendant’s defence maybe.

The payment of Kshs.44,495,639/- by the Plaintiff to the 2<sup>nd</sup> Defendant has not been denied. The issuance of cheques totaling the said amounts produced as “PS4” issued on the 1<sup>st</sup> Defendant’s account has also not been denied. The only issue raised is that no monies was paid to the 1<sup>st</sup> Defendant and that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are sued as directors of the 1<sup>st</sup> Defendant. My view is that the 1<sup>st</sup> Defendant has been properly sued. It issued cheques totaling the sum of Kshs.44,495,639/- which were returned on presentation. On the authority **NJOKA TANNERS LTD & ANOR –VS- PAUL KAGIA (supra)**. I am satisfied that the 1<sup>st</sup> Defendant was properly sued on those cheques which it issued and were dishonoured.

As regards the 2<sup>nd</sup> Defendant, all the cheques issued by the Plaintiff were in his name and he encashed the same. He received and enjoyed the proceeds thereof. He is not sued merely as a director of the 1<sup>st</sup> Defendant but as a debtor. The suit as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant, jointly and severally, is in my view indefensible.

In any event, I also note that there was no Affidavit sworn by or on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant in support of the application.

On the foregoing reasons, the application by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant is hereby dismissed with costs.

In my view, the existence of the criminal case is not a bar to this civil proceedings. Section 193A of the Criminal Procedure Code itself allows the concurrent continuation of proceedings. The Said Section provides:-

***“notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”***

As regards the 3<sup>rd</sup> Defendant in paragraph 4 of the Plaint, the Plaintiff pleaded that the amount claimed was paid to the Defendants for purchase of hides and skins on behalf of the Plaintiff. Although evidence on record shows that all the cheques were issued in the name of the 2<sup>nd</sup> Defendant, the 3<sup>rd</sup> Defendant has not denied in her Affidavit that she never received the money nor that she is not liable to the Plaintiff on its claim. Indeed in her Supporting Affidavit sworn on 16<sup>th</sup> March, 2011, she swore at paragraphs 4 and 6 thus:-

***“4. THAT the said arrest and detention in civil jail is not only founded on mala fides but is irregular for the reasons that:-***

***(i) .....***

***(ii) The 1<sup>st</sup> Defendant company and the 2<sup>nd</sup> Defendant are currently being tried for the same cause of action in the chief magistrates court at Kibera, .....***

***(iii) We have not refused to pay the debt if indeed this honourable court will find it so, BUT for the time being, we ought to be afforded the sacrosanct opportunity to defend this suit now that we have knowledge of it.***

**6. *We the Defendants have a good defence and this honourable court's conscience ought to be pleased to allow us present the same.***

The charge sheet produced as "DM1" shows that it is only the 2<sup>nd</sup> Defendant who has been charged in **Cr. Case No. 5457/2010** at the Kibera Chief Magistrates' Court. The company has not. Here I note that the 3<sup>rd</sup> Defendant was misleading the court. Further, she did not make any express denial of the debt, she stated that defendants were prepared to pay if the court finds them liable.

To my mind, the averments of the 3<sup>rd</sup> Defendant do not convince me as to her defence. She is not sued as a director of the 1<sup>st</sup> Defendant as contended, but as a party who was paid jointly with the other Defendants to deliver hides and skins to the Plaintiff. I am likewise not convinced that she has any defence to the Plaintiff's claim. Accordingly, I also dismiss her application with costs.

This should have marked the end of the ruling since prayer No. 2 for stay of execution was already spent. However, there were averments in the Affidavit and submissions that the mandatory ten (10) day notice of entry of judgment was never served upon the Defendants and the execution therefore was irregular. Although Praful Shah swore that the said notice was given, he never produced any evidence of such notice. I have perused the entire record and I did not see any such notice. In my view, such notice should accompany an application for execution of decree and be filed with the court. The application for execution made by the Plaintiff on 16<sup>th</sup> July, 2010 was never accompanied by such notice.

Accordingly, my view is that a litigant must at all time comply with the rules since such rules have a purpose. I am of the view that there having been no such notice, the entire process of execution was irregular. I set aside the entire process of execution and direct the Plaintiff to comply with the law accordingly.

The Upshot is that the Defendants' application dated 16<sup>th</sup> March, 2012 is dismissed with costs.

**DATED** and delivered at Nairobi this 13<sup>th</sup> day of June, 2012.

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**A. MABEYA**  
**JUDGE**