REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL CASE NO. 330 OF 2009

STEGMA ENTERPRISES LTD.....PLAINTIFF

VERSUS

VIKTA MAINA NGUNIRI.....DEFENDANT

RULING

By a ruling delivered in this matter on 26th March, 2010, this court entered default judgment against the Defendant. Following that ruling, the Defendant filed an application by Chamber Summons dated 6th April, 2010, praying for orders, *inter alia*, that the said judgment be set aside, varied or reviewed; that there be a stay of the subsequent decree, and that there be a stay of execution of the aforesaid ruling.

Following closely in the Defendant's footsteps, the Plaintiff also filed an application by Notice of Motion dated 21st April, 2010. The Applicant sought orders that this application be heard jointly together with the Defendant's application by Chamber Summons dated 6th April, 2010 (supra) and that the Defendant be summoned to be cross-examined generally on his supporting affidavit dated 6th April, 2010, and specifically as regards the identity of the undisclosed Auctioneer who purportedly informed him of the existence of these proceedings. The application also seeks an order that the aforementioned Auctioneer be summoned to be cross-examined on his role in these proceedings.

After the hearing of the two applications was adjourned severally to pave way for the cross-examination of the Defendant and the alleged undisclosed Auctioneer who purportedly informed him of these proceedings, the parties entered a consent on 14th January, 2011 in the following terms –

"**BY CONSENT the Defendant's application dated 6th April, 2010, and the Plaintiff's counter application dated 21st April, 2010, be allowed in the following terms –**

(1) That the judgment entered on 12th August, 2009; the Decree extracted therefrom and issued on 2nd March, 2010; and the Certificate of Costs issued on 15th march, 2010, be set aside.

(2) **The Defendant to file and serve a Memorandum of Appearance and a defence within 21 days of this consent.**

(3) **Clauses 1 and 2 herein above are allowed on condition that the thrown a ways costs, if any, be determined by the court after considering submissions by the parties.**

(4) **Written submission be filed and exchanged between the parties within 14 days from today."**

Pursuant to Orders 3 and 4 of the above consent, the parties filed written submissions on the issue of thrown away costs. The Defendant's case is that he was never served with any document requiring him to enter any appearance in this matter and therefore he did not file the Memorandum of appearance which is on the record. He doesn't know who filed it and did not sign it. If he had been served, he says he would have instructed his Advocates to appear for him rather than file the Memorandum of Appearance personally. He only got to know about this case long after default judgment had been entered and execution commenced.

On the other hand, the Plaintiff asserts that the Defendant does not disclose who informed him about the case and he does not accuse the Plaintiff of entering that appearance. The Defendant should therefore meet the thrown away costs.

Having considered the rival submissions of the parties, I note that judgments, such as the one sought to be set aside herein, fall into two main categories. These are either regular or irregular. If there isn't any or any proper service of summons appearance to enter appearance, the resulting default judgment is an irregular one which the court must set aside *ex debito justitiae* (as a matter of right) on the application of the Defendant. Such a judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself (See **GANDHI BROTHER** v **HK NJAGE t/a HK ENTERPRISES NAIIROBI** (Milimani) **HIGH COURT CIIVIL CASE NO 1330 OF 2001.**

Where, however, the default judgment is a regular one, the court still retains an unfettered discretion to set aside such judgment and any consequential decree or order upon such terms as are just.

In the instant case, there is a memorandum of appearance on record, filed ostensibly by the Defendant on 19th May, 2009. It was the failure to file the defence within 15 days of entering appearance that led to the entering of the default judgment which is the subject matter of this application.

After considering the rival submissions by the parties, I find that it is impossible to say positively at this juncture who filed the memorandum of appearance. Whether the signature on that document is that of the Defendant or not calls for an expert's opinion, and no such opinion has been rendered, the Defendant has not alleged that the signature is that of the Plaintiff, on the one hand, and at the same time one cannot say with certainty that it is the Defendant's signature. Moreover, one wonders how or why the Defendant would enter the memorandum of appearance and then fail to follow it up with a statement of defence until the commencement of the execution proceedings. For these reasons I would find it oppressive to condemn any of the parties for a signature whose origins are purely speculative.

In the absence of any evidence one way or the other, I think that the fairest route to take would be to direct that each party will bear its own costs of their respective applications and that there would be no order as to thrown away costs.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 31st day of March 2011

L NJAGI

JUDGE