



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION – MILIMANI
CIVIL CASE NO. 619 OF 2009

DEPOSIT PROTECTION FUND BOARD.....PLAINTIFF

VERSUS

CITY CABANAS LTD.....DEFENDANT

R U L I N G

This application is brought by way of a Chamber Summons dated 1st December, 2009, and taken out under **Order IX A Rules 10 and 11** of the **Civil Procedure Rules, Sections 3 and 3 A** of the **Civil Procedure Act** and all other enabling provisions of the law. The Applicant seeks the following substantive orders from the Court –

- 1. That the honourable Court be pleased to stay any further proceedings and/or execution herein or any consequential order pending inter partes hearing and determination of this application.**
- 2. That this honourable Court be pleased to set aside ex debito justiae the judgment entered in the suit herein and consequential orders premised thereon.**
- 3. That the Defendant be at liberty to apply for such further orders as the Court may direct or deem fit to grant.**
- 4. That the costs of this application be in the cause.**

The application is supported by the annexed affidavit of Rosaline Njeri Macharia, a Director of the Defendant Company, sworn on 1st December, 2009. It is based on the grounds that on 22nd October, 2009, the Plaintiff obtained *ex parte* judgment on the strength of a false affidavit of service of summons to enter appearance.

Opposing the application, the Plaintiff's Advocates filed grounds of opposition on 14th December, 2009. In the said grounds they allege that the application was brought in bad faith and was only intended to unnecessarily vex the Plaintiff, a successful litigant, and keep it away from the fruits of its lawfully obtained judgment. They also state that the Defendant has admitted that the Plaintiff did advance monies to it but it has failed to tender any evidence in support of its claim that it repaid the Plaintiff the monies. It is further their case that the draft defence does not raise any triable issues. Finally, they state that the Defendant's application is devoid of any merit, frivolous, vexatious and an abuse of Court process and does not satisfy the conditions required under the law for the granting of the orders sought, and therefore the application should be dismissed with costs.

At the hearing of the application, Mr. Kimani for the Defendant relied entirely on the supporting affidavit of Rosaline Njeri Macharia and also on the grounds set out on the face of the application. He further argued that the main ground of application was that there was no service of summons to enter appearance. He also contended that the affidavit of service was a forgery as the person allegedly served did not work and has never at any time worked with the Defendant. He asserted that Rosaline Macharia, the deponent of the supporting affidavit, had explained that she only came to know of the existence of the suit through a friend. He also contended that the Defendant does not run a hotel business at Cabanas, and that Cabanas is not the Defendant's place of business. He finally submitted that the Defendant had a strong defence on merit as evidenced by the draft defence and that the amount claimed did not constitute a liquidated claim and required a full hearing. Finally, he submitted that the authorities relied on by the Plaintiff did not apply to this case.

On her part, Ms. Kamunya for the Plaintiff argued that the sums of money in question constituted a liquidated claim. She contended that City Cabanas is a landmark along the Mombasa Road and that was where service was effected and that the person served accepted that she was a Principal officer of the Defendant. She also contended that no evidence had been adduced to show that City Cabanas had been shut down. It was therefore her submission that the service was proper and she relied on the cases of **DAKAWAOU TRANSPORT LTD. v.**

HCCC NO. 50 of 2004 (UR); CHARLES MWATHI v. KENYA BUREAU OF STANDARDS, HCCC NO. 1058 of 2006 (UR); TRUST BANK LTD. v. ANGLO AFRICAN PROPERTIES HOLDINGS LTD, HCCC NO. 2118 of 2000 (UR); and NAIROBI FLOUR MILLS LTD. v. JOHNSON KITHETE t/a FARMERS GENERAL STROES, HCCC NO. 689 of 2004. She thereupon urged the Court to so find and dismiss the application.

In a brief reply, Mr. Kimani insisted that service was not effected and that the premises where it was allegedly served did not belong to the Defendant. He therefore asked the Court to find that there was no proper service and allow the application.

Having considered the pleadings and the respective submissions of Counsel, I note that judgments are divided into two categories i.e. regular and irregular judgments. The principles guiding the setting aside of *ex parte* judgments ordain that if there is no proper or any service of summons to enter appearance to the suit, 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, and such a judgment is not set aside in exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself. Where, however, a default judgment is a regular one, the Court has an unfettered discretion to set aside such judgment and any consequential decree or order upon such terms as are just as prescribed by **Order IXA Rule 10** of the **Civil Procedure Rules**. Furthermore, where the judgment is regular, the Court will not usually set it aside unless it is satisfied that there is a defence on merit and a defence on merit does not mean a defence that must necessarily succeed, but one that raises triable issues which raise a *prima facie* defence and which should go for trial and adjudication.

Applying these principles to this case, the issue to be determined is whether the summons to enter appearance in this case were properly served. According to the affidavit of service sworn by Duncan Masime, on 7th October, 2009, the deponent states that on 1st September, 2009, at around 4.00 p.m, he proceeded to the Defendant's business premises situated along Mombasa Road, Nairobi, with the intention of serving the said summons and plaint upon the Defendant. On arrival at the said premises, he met a lady who informed him that she worked at the Defendant's Company as the receptionist but refused to give him her name. He then introduced himself to her and the purpose of his visit and inquired from her whether any of the Principal Officers was present upon which she directed him to the Principal Officer's office. On arrival at the said office, he met one lady who introduced herself as Anne Ng'endo, the Restaurant Manager. He introduced himself to her and the purpose of his visit and tendered to her summons to enter appearance and the plaint. After reading and understanding their contents, she informed him that she had authority to receive and sign on behalf of the Company. She accepted service by writing her name, signing and dating on his principal copy which is annexed to his affidavit of service.

On the other hand, in her supporting affidavit, Rosaline Njeri Macharia, a Director of the Defendant

herein, states that the Defendant ceased running hotel premises along Mombasa Road when the business was no longer viable and the allegation that service was effected upon one Anne Ng'endo at Mombasa Road premises, where the Defendant herein allegedly carries on business, is untrue and dishonestly meant to prejudice the Defendant herein. She further deposes that the premises allegedly run by the Defendant are currently ran by Cabanas Highway Ltd., entity incorporated on 28th April, 2009, and totally independent of the Defendant. A copy of Cabanas Highway Limited's Certificate of Incorporation is annexed to her affidavit. The fact that the Defendant does not carry on business along the alleged premises on Mombasa Road is further evidenced by the annexed copy of the year 2009 Single Business Permit issued to Highway Cabanas. Finally, Ms. Ng'endo deposes in her affidavit that she contacted the entity currently running the hotel business on the premises formerly by the Defendant and was informed by a Director, one Justin Muriuki, that he was unaware of the service. He also informed her, which information she verily believes to be true, that the entity does not have a staff member by the name of Anne Ng'endo as alleged in the affidavit of service.

From the above pleadings, it is clear that the assertion by the process server that he served the summons and plaint on one Anne Ng'endo is strongly contested. The Defendant's contention that it no longer carries on business in the premises along Mombasa Road where the summons to enter appearance were served has not elicited any rejoinder from the Plaintiffs. So also is the Defendant's assertion that even if service was effected at the said premises, the entity carrying on business therein does not have any officer by the name of Anne Ng'endo. On the other hand, even though the Plaintiffs appear to be cagy as to where they carry on their business, it is imperative that they should establish affirmatively that they effected the requisite service of summons to enter appearance. From these observations, and seeing particularly that the existence of the person allegedly served is seriously contested, I find that the service of summons in this matter is highly questionable and that the judgment in default cannot stand in the absence of positive proof of the existence of Anne Nge'ndo. Therefore, the same warrants to be set aside.

If I am wrong in finding that the service of summons to enter appearance was irregular, and that the judgment in default should be set aside on account of that irregularity, this Court still retains jurisdiction to set aside the judgment and any consequential decree or order upon such terms as are just. However, the Court should be satisfied that there is a defence on merits before it can do so. As observed earlier, such a defence does not mean one which must necessarily succeed, but one which discloses *bona fide* triable issues for adjudication. In that context, the Court has perused the draft defence offered by the Defendant. After so doing, I note from the exhibit "RNM - 6" attached to the supporting affidavit of Rosaline Njeri Macharia that by a letter dated November 30th, 1998, the Defendants had applied for a temporary overdraft for Kshs.1 million for one month – December, 1998. In the said letter, the author undertook to have the overdraft cleared before the end of that year. By their letter dated December 4th, 1998, the Plaintiffs confirmed the terms of the overdraft for the period of one month maturing on 4th January, 1999. The security requested was a deposit of two log books and personal guarantee of the Directors.

In paragraphs 7 and 8 of the draft statement of defence, the Defendant states that all the facilities were repaid and the Defendant's obligations discharged. It is the Defendant's further case that the Defendant does not owe the Plaintiff any monies as the last overdraft was in November, 1998 for the sum of Kshs.1 million, the full amount of which was duly paid by 31st December, 1998. It is not clear from the pleadings what the fate of the securities offered by the Defendants was. It is not even certain whether the Directors executed the required guarantees. These observations raise the issue whether the Defendant truly owes the Plaintiff the sum of Kshs.13,375,417.55 as claimed by the Plaintiffs or any other sum, or whether the Defendant discharged its contractual obligation to the Plaintiffs as it alleges. This is a seriously triable issue which can only be answered by evidence from both parties.

On account of the foregoing, prayers (2) and (3) of the application by Chamber Summons dated 1st December, 2009, are hereby granted as prayed. In view of the observations made herein, I think that the best order to make on costs is that these be in the cause.

Orders accordingly.

Dated and delivered at Nairobi this 8th day July, 2010.

L. NJAGI

JUDGE