



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

Civil Suit 165 of 2009

MAGNATE VENTURES LTD.....PLAINTIFF

VERSUS

**DAVID SOME BARNO.....1ST DEFENDANT
SAMUEL WARUGU KIMOTHO.....2ND DEFENDANT
WINFRED NYAWIRA MAINA..... 3RD DEFENDANT
EMANGANE SAMETA INVESTMENTS LTD.....4TH DEFENDANT**

RULING

The 4th defendant/applicant was joined in this suit by way of an amended plaint dated 10th June, 2009. This was under Order VIA Rule I of the Civil Procedure Rules.

Following the said joinder, the 4th defendant is said to have been served with summons to enter appearance together with the a plaint, by way of registered post through its postal address and failed to either enter an appearance or file a defence to the suit in time. At the instance of the plaintiff, an interlocutory judgment was entered by the Deputy Registrar on 14th July 2009. There is now before me an application by way of Chamber Summons under Sections 3A and 5 of the Civil Procedure Act Cap 21 Laws of Kenya and Order IXA Rules 10 and 11 and Order 21 Rule 22 of the Civil Procedure Rules for the following orders;

1. That this honourable court be pleased to stay the execution of the ex-parte judgment entered herein on 14th July 2009 against the 4th defendant pending the hearing and determination of this application.
2. That this honourable court be pleased to set aside the ex-parte judgment entered herein against the 4th defendant on 14th July, 2009 and consequential orders issued thereto and the 4th defendant be allowed to appear and defend the suit unconditionally.
3. That the attached draft defence be deemed duly filed upon the payment of requisite court fees
4. That this honourable court be pleased to grant further orders and or directions as it deems fit and expedient in the circumstances.
5. That the costs of this application be borne by the plaintiff/respondent.

The grounds relied upon by the 4th defendant/applicant are;

- a. An ex-parte judgment against the 4th defendant/applicant was entered herein on 14th July, 2009 for the sum of Ksh.15 million.
- b. The 4th defendant received the summons to enter appearance and amended plaint on 23rd July, 2009 and immediately instructed its advocates to enter appearance and file defence which defence and Memorandum of Appearance were filed on 29th July, 2009.
- c. By the time the appearance was made and defence filed, judgment had already been entered and the 4th defendant was unaware of the fact.
- d. The 4th defendant has never been informed of the existence of the ex-parte judgment and only came to realize of its existence on 23rd September, 2009 when its advocates perused the court file.
- e. The plaintiff's claim was inappropriate for the entry of judgment under Order IXA Rule 3 since the definite figure claimed required investigation beyond calculation.

f. The applicant is ready to comply with such terms and conditions as this honourable court may deem just and fit to order all the circumstances considered.

g. There has not been any inordinate delay in the presentation of this application.

In addition to the said grounds there is a supporting affidavit sworn by Haron Osoro Nyamboki who is said to be a Director of the 4th defendant's company. The application is opposed and there is an affidavit in that respect sworn by Stanley Kinyanjui who is said to be a Director of the plaintiffs.

Both learned counsel for the plaintiff and the 4th defendant have filed submissions and cited several authorities. I have taken time to go through those submissions and also the authorities cited and in the event that I do not refer to any specific case this should not be considered as wanting in substance.

I started this ruling by observing that the 4th defendant was added as a party to this suit after the suit had been instituted. It is the plaintiff's contention that this was perfectly in order as Order VIA Rule 1 allows a party without the leave of the court to amend any pleading once at any time before the pleadings are closed and therefore it was perfectly in order to include the 4th defendant in the plaint.

On the other hand, it is the 4th defendant's case that the plaintiff could not have done so without complying with Order I Rule 10(2) and Order I Rule 10(4) of the Civil Procedure Rules.

Order 1 Rule 10(4) provides as follows;

“Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.”

It would appear that the court may on its own motion or at the instance of any party order the inclusion of any party to ensure the ends of justice are met. Thereafter, the provisions of Order VIA come into play. It is not therefore correct to say that the plaintiff complied with the said requirement by invoking Order VIA Rule 1 of the Civil Procedure Rules. Indeed I am fortified in so holding by order VIA Rule 1(2) which refers to an amended plaint to be served on a defendant which necessarily implies that a party can only be served with such pleadings when he is already on record.

I must now look at whether or not the judgment on record, and which is sought to be set aside, was regular. If the said judgment was regular then I must go to the next stage of addressing the issue of merit. The first consideration is whether or not service of summons was proper in this case. There is an affidavit sworn by Mr. Nelson Havi who is the learned counsel for the plaintiff herein that due diligence was conducted before the 4th defendant was served by way of registered post. The search of the physical address and particulars of the 4th defendant was conducted by one Mary Muthoga who is said to be a clerk in the firm of Mr. Havi Advocate.

I note, with respect, that the said Mary Muthoga has not sworn any affidavit to that effect. That is not to say, however, that Mr. Havi was misleading this court. I can only point out that where counsel becomes the Process Server in a suit where he is representing one of the parties he is in effect entering the arena of conflict because if any step he takes is disputed, he may be required to be called as a witness. Be that as it may, service of process by way of substituted service should be invoked as a last resort.

I hasten to add that, Order V Rule 2(b) envisages a situation where the Process Server is unable to find any officers of the corporation as set out in this rule and only then should the means of postal address be used. In this case it is not Mr. Havi who was unable to find the officers of the 4th defendant but his clerk.

I have some reservations as to the mode of service in this case. But that is not the basis upon which I am about to reach the conclusion that I will. Order IXA Rule 3(1) provides as follows;

“Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail to appear, the court shall on request in form No.26 of Appendix C, enter judgment against the defendant or the defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of suit, at such rates as the court thinks reasonable, to the date of the judgment, and costs.”(emphasis added)

From the pleadings the 1st, 2nd and 3rd defendants agreed to sell to the plaintiff part of a property known as LR. No.72/2881 at the price Kshs.53 million. It is the plaintiff's case that he paid a sum of Kshs.10 million as a deposit to the 1st, 2nd and 3rd defendants. It would appear that this transaction did not go through because it is the plaintiff's case that, the 1st, 2nd

and 3rd defendants subsequently sold the same property to the 4th defendant for a sum of 68 million. As a result, he has accused all the defendants of fraud, particulars of which he has set out in the plaint.

In the particulars of his claim he has claimed the difference between the consideration of the sale to the plaintiff and the sale and transfer to the 4th defendant in the total sum of Kshs.15 million and interest on the deposit of Kshs.10 million paid to the 1st, 2nd and 3rd defendants. The total claim is captured in paragraph 13 where the plaintiff claims special damages of Kshs.15 million and interest on the deposit of 10 million and in the alternative, specific performance of the agreement.

Going by the orders sought in the plaint from (a) to (g), it is clear that the plaintiff's claim is not confined to the liquidated sums set out herein above. Going by Order IXA Rule 3(1) it is my considered view that the plaintiff cannot, even if his claim may be said to be liquidated, apply for neither can the court enter judgment because there are other claims in the plaint which cannot be said to be liquidated.

There is also the other fact that, the initial deposit of Kshs.10million was paid to the 1st, 2nd and 3rd defendants before the 4th defendant was brought into the picture. The plaintiff can only justify through evidence why the 4th defendant should be held liable to pay anything it did not receive. There is then the other consideration as to why the plaintiff is entitled to the difference between what he agreed to pay to the 1st, 2nd and 3rd defendants and what the 4th defendant agreed to pay the 1st, 2nd and 3rd defendants.

Clearly this is also the matter of evidence. The foregoing pulls out the plaintiff's claim against the 4th defendant from any submission that it was a liquidated claim if at all; The interlocutory judgment, with respect, was irregular. There are some other issues which have been raised including the capacity of advocates on record but I believe that the amendment of the Civil Procedure Act and in particular the introduction of Section 1A of the Civil Procedure Act cures all those technicalities.

I do not wish to delve any deeper into this matter because to do so may prejudice the positions of the parties herein. Suffice to say, the plaintiff has not justified the resistance of the application by the 4th defendant which I find has all the merits to be allowed.

Accordingly I allow the 4th defendants application dated 24th September, 2009 and order that the interlocutory judgment entered against the said defendant on 14th July, 2009 together with all consequential orders thereunder are hereby set aside. Subject to payment of filing fees the Memorandum of Appearance and the statement of defence of the 4th defendant shall be deemed to have been filed. The costs hereof shall be in the cause.

Orders accordingly.

Dated, signed and delivered at Nairobi this 14th day of October, 2010.

1 A. MBOGHOLI MSAGHA
JUDGE