

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 248 of 2008

COLLECTION HOUSE LIMITED..... PLAINTIFF

VERSUS

**SHAUKAT FAROOQ.....
DEFENDANT**

RULING

Before me is an application by the defendant made under Order IXA Rule 10 of the Civil Procedure Rules and Sections 3A and 63(e) of the Civil Procedure Act seeking orders of this court to set aside the *exparte* judgment entered against the defendant together with all the consequential orders that flowed therefrom. The defendant further sought to be given unconditional leave to defend the suit. Pending the hearing and the determination of the application, the defendant prayed that the default judgment and decree issued in favour of the plaintiff be stayed. The grounds in support of the application are stated on the face of the application. The defendant stated that he was never served with the summons to enter appearance. He pleaded to be allowed unconditional leave to defend the suit in the interest of justice and fairness. He stated that he has a good defence on merits which could only be ventilated if the *exparte* judgment entered was set aside. The application is supported by the annexed affidavit of Shaukhat Farooq. He swore an affidavit in further support of this application. Ali Shaban, a security guard employed at the defendant's place of residence swore a supplementary affidavit in further support of the defendant's application.

Nyawira Mwangi, the recoveries manager of the plaintiff company, swore two replying affidavits in opposition to the defendant's application. In essence, it is the plaintiff's case that the defendant was duly served with summons to enter appearance; had no defence to the plaintiff's claim; had admitted owing the sum claimed by the plaintiff in its plaint; that the defendant was a foreigner and had no other property in Kenya other than the attached property. The plaintiff therefore urged the court to protect the plaintiff's interest, if the *exparte* judgment is set aside, by granting a conditional leave to the defendant to defend the suit; that the defendant's application lacked merit as it was incompetent. The plaintiff further filed a notice of preliminary objection to the defendant's application. In the said notice, the plaintiff stated that the application was fatally defective because it failed to comply with the mandatory provisions of the **Civil Procedure Act** and the **Rules** made thereunder.

Before the hearing of the application, the counsel for the parties herein agreed by consent to file written submissions. They duly filed the said written submissions in support of their respective client's cases. At the hearing of the application, I heard the submissions made by Mr. Nyaoga for the plaintiff and Miss Kiniti for the defendant. Having carefully considered the said rival arguments, and also having read the pleadings filed by the parties in support of their respective opposing positions, the issue for determination by this court is whether the defendant has established a case to entitle this court set aside the *exparte* judgment.

The principles to be considered by this court in determining whether or not to set aside a default judgment are well settled. Where it is established that there was no proper service, this court has no option but to set aside such judgment *ex debito justitiae* (see **Kanji Naran vs. Velji Ramji (1954) 21 EACA 20**). The court has no discretion other than to set aside the *ex-parte* judgment. Where it is established that the defendant was served, this court has unfettered discretion to set aside the default judgment, provided that

in so doing, no injustice is occasioned to the opposing party. The discretion to set aside ex-parte judgment is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice (see **Shah vs. Mbogo [1967] EA 116**). Finally, the court must be satisfied that the defendant has a good defence on merits (see **Maina –vs – Mugoria [1983] KLR 78**).

In the present application, it was the defendant's case that he was not served with summons to enter appearance. In support of this assertion, the defendant claimed that at the material period that the process server claimed to have served him with summons to enter appearance, he was out of the country. He annexed copies of entries made in his passport in support of his claim that he was in Dubai, among other countries, at the time the plaintiff alleged to have served him. The defendant procured the security guard who guards his residential house to swear an affidavit denying that he was so served as claimed by the process server. The defendant did not however request the court to have the process server summoned to appear in court to enable his cross-examination on the contents of his affidavit of service. I have carefully perused the said affidavit of service sworn by Peter Muriithi Mwaniki, the process server who is alleged to have served the defendant. In the said affidavit of service, he described the residence of the defendant.

Although the defendant claimed that there were only four houses in the compound of his residence, I was persuaded that the said process server indeed served the defendant. It was evident that the process server was telling the truth when he identified by name the security guard at the said residence of the defendant.

Although the said security guard denied that he had directed the process server to the house of the defendant, it was clear to this court that the defendant, in procuring the said security guard to swear the supporting affidavit, was engaging in damage control. I was not convinced by the defendant's assertion that he was out of the country when he was served by the said process server. I looked at copies of entries made in the defendant's passport. I was not persuaded that the defendant made full disclosure in regard to his whereabouts at the material time it was established that he was served with summons to enter appearance. I therefore hold that the default judgment entered against the defendant, was in the circumstances, regular since the defendant was personally and properly served with summons to enter appearance.

However, as stated earlier in this ruling, this court has unfettered discretion to set aside a default judgment even where it is established that the ex parte judgment was regular. In the present suit, the basis of plaintiff's suit is a deed of assignment by one Mr. Bashir who allegedly was a major shareholder in a limited liability company known as Firoze Construction Company. It is the plaintiff's claim that the defendant converted a sum of KShs.40 million from the company to his personal use when the company's management was left in the defendant's hands at the time the said Mr. Bashir fell ill. The plaintiff alleged that the defendant had admitted defrauding the company the said sum and made an undertaking to refund a sum of KShs. 20 million. It is this amount that the plaintiff is claiming on behalf of Mr. Bashir in this suit.

In his draft defence, the defendant denied owing this amount to the said Mr. Bashir. He denies admitting to owing any sum to the said Mr. Bashir. He states that if there was any sum owed by the defendant, then it was owed to Firoze Construction Company, which ought to have been disclosed as a necessary party in the plaint. I have evaluated the plaintiff's claim vis-à-vis the defence intended to be put forward by the defendant as evidenced by his draft defence. It is clear to this court that the said draft defence raises triable issues. The defendant should in the circumstances be granted leave to defend the plaintiff's claim.

In the premises therefore, I will set aside the ex parte judgment entered against the defendant by this court on 9th June 2008. All the consequential orders flowing therefrom are set aside. The defendant is granted conditional leave to defend the suit. The condition attached to the order setting aside the ex parte judgment is that the prohibitory order issued by this court in respect of the parcel of land known as LR No.209/1210/17, Nairobi, registered in the name of the defendant, shall remain in place pending the hearing and determination of the suit. The defendant is ordered to file and serve his defence within fifteen (15) days of today's date, or in default thereof the orders granted herein in his favour shall

automatically lapse.

The defendant shall pay to the plaintiff thrown away costs of KShs.20,000/= within fifteen (15) days of today's date. Similarly, if the above amount shall not be paid within the said stipulated period, the orders granted herein shall automatically lapse.

It is so ordered.

DATED at **NAIROBI** this **22nd** day of **APRIL, 2009**.

L. KIMARU

JUDGE