



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT 3839 OF 1989

CITY FINANCE BANK LIMITED.....PLAINTIFF

VERSUS

COMPUTER WORLD SERVICE LIMITED

MATHIA B. KEAH

NATHAN W. BARASA

WATIBINI P. MASIBO

SIMON MAUNCHO.....DEFENDANTS

RULING

The plaintiff herein, City Finance presented its claims to this court, vide a plaint dated 23rd day of August 1989 filed on a date not visible as the file appears to have been reconstructed. The action is brought against 5 defendants namely Computer World Service Ltd, Mathia B. Keah, Nathan W. Barasa, Watibini P. Masibo and Simon Mauncho. The description of parties is found in Prayer 1, 2, 3, 4, 5 and 6 of the plaint. The plaintiff and 1st defendant are described as limited liability companies, duly incorporated in Kenya, under the relevant laws, whereas the 2nd to the 5th defendants are described as the Directors of the first defendant.

The cause of action runs from paragraph 7 of the plaint and briefly is to the effect the 2nd to the 5th defendants gave a continuing guarantee and indemnity in writing to the plaintiff dated 9th November 1986, by reason of which they undertook to repay to the plaintiff forthwith on demand the following.

- All sums which would at any time be or would become due from the first defendant to the plaintiff including interest limited to Kshs 150,000/= from the date of demand.
- All sums which the plaintiff would at any time be or become liable to pay any person, firm or corporation as a consequence of any transaction between the first defendant and the plaintiff.
- All costs and expenses of whatsoever nature incurred by or on behalf of the plaintiff in

attempting to obtain payments of the same referred to in (i) and (ii) above.

- All costs and expenses of whatsoever nature incurred by or on behalf of the plaintiff in safeguarding or otherwise howsoever dealing with any bills, drafts, documents or goods in any way relating to or connected with any transaction between the first defendant and the plaintiff.

The plaintiffs complaint against the defendants is found in paragraph 8 of the plaint and it is to the effect that:-

- the plaintiff drew a bill of exchange upon the 1st defendant of Kshs 100,000.00 dated 2/9/1987 which became due and payable on 1/12/1987 but it was dishonored, thereby attracting interest at 18% per annum from 1/12/1987 up to 30/6/1989 or until amounting to Kshs 28,800.00

- another bill of exchange dated 2/9/1987 drawn by the plaintiff upon the 1st defendant to the tune of kshs 50,000.00 payable on 2/9/1987 when it was dishonored thereby attracting interest at 18% p.a from 1/12/1987 up to 30/6/1989 or till payment in full to the tune of Kshs 400,000.00, there by attracting interest at 18% p.a from 1/12/1987 up to 30/6/1989 until payment in full amounting to Kshs 151,230.00.

In consequence thereof the plaintiff claimed Kshs 850, 630/- interest on 350,000/- at 18% from 1/7/1989 until payment in full and costs.

There is a copy of a memo of appearance dated 22nd day of December 1989 and filed on 28th day of December 1989 for the 2nd, 3rd and 4th defendant. This was entered by the firm of Cheloti, Etole and Kokonya advocates. There is another memo of appearance dated 6th day of November 1989 entered by the firm of Wetangula & Company advocates for all the 5 defendants. It was filed on a date not visible from the photocopy.

Also traced on the record, is a return of service dated 4/11/1989 signed by a process server by the name of Samwel Odero. The content reads:-

“ I on 27th October 1989 at 10.20 a.m. I served Mr. Simon Maicho at his offices 5th floor Travel house Nairobi being the 5th defendant in this suit. He accepted service as the defendant named herein and also accepted the summons for first defendant in his capacity as a director in the said company (Computer World Service Ltd). He signed on both principal summons.” This R/S was followed by a request for judgment dated 3rd day of January 1990 by the plaintiff filed on the 5th January 1990. It requested judgment against the stand 5th defendant who had failed to file a defence within the prescribed time. The request was for Kshs 859,630/= with interest on Kshs 550,000/= at the rate of 18% p.a from 1st July 1989 until payment in full plus costs.

There is also traced on record an application by way of notice of motion, brought under XXXXVR.1 and order XII R6 CPR and section 3A of the CPA. It is dated 23rd day of August 1991 and filed on 20th September 1993. It sought 2 prayers namely:-

(1) *That judgment be entered for the plaintiff/applicants against the 1st to 5th defendants for Kshs 859,630/- together with interest and costs as prayed in the plaint filed on 5th September 1989, the defendants having no defence capable of refuting the plaintiffs claim at the same time the defendants herein having admitted the claim.*

(2) *That the costs of this application be paid by the defendants, in any event.”* It is supported by grounds in the body of the application, supporting affidavit and annexures.

The application is noted to have gone before Olekelwa J as he then was (now JA) on 23rd June 1997 (23/6/1997) and heard exparte in the absence of the defendants and the learned judge made the

following orders:

“ I am satisfied that the defendants to this suit have no defence to the suit which raises triable issues to be permitted to proceed for trial thereto. Accordingly judgment is granted to the plaintiff as prayed for in the plaintiff with costs of the suit and the application.” What followed is that costs be paid to the plaintiff.

It is against this background, that the 3rd defendant has moved to this court, by way of Notice of motion under order 35 rule 10 CPR, read with section 3A Civil Procedure Act. It is dated 21st day of November 2003 and filed on 25th November 2003. The prayers sought are 3 namely:

- (a) That the summary judgment entered on the 23rd day of June 1997 against the 3rd defendant be set aside.
- (b) That the 3rd defendant be granted unconditional leave to defend the plaintiff claims.
- (c) That the costs be awarded to the 3rd defendant.

The grounds in support are set out in the body of the application, supporting affidavit, annexures, written skeleton arguments filed herein. The major ones are as follows:-

- That the applicant is the 3rd defendant herein.
- It is his contention that he was never served with the summons to enter appearance, which service was required to be personal unless if he had an agent duly authorized to receive summons on his behalf.
- That he had no agent duly authorized to receive summons on his behalf.
- That he had no agent duly authorized to receive summons on his behalf.
- That he is a stranger to the two counsel who entered appearance herein marked as annexure Exh A1 dated 6th day of November 1987 filed on a date not visible by the firm of Wetangula and company advocates. It indicates that entry of appearance was being entered for all the 5 defendant. The second memo of appearance is dated 22nd day of December 1989 by the firm of Cheloti, Etole and Kokonya advocate for the 2nd, 3rd and 4th defendants. If is filed on a date not visible, that indeed he had been one of the Directors of the 1st defendant but vide a letter dated 23rd day of May 1987 he tendered his resignation or the 1st defendants Directorship as shown by exhibit B1.
- The said resignation was accepted by the management of the first defendant vide their letter dated 29th May 1987 as shown by annexure Exh B2.
- That the aforesaid acceptance of his resignation for the Directorship of the 1st defendant, Returns were filed showing that he had ceased to be a Director with effect from 1st June 1987 as shown by Exhibit C.
- The reasons for resignation was incompatibility with the other Directors as reflected in a letter form Cheloti, Etole and Kokonya Advocates dated 5th January 1989 annexure Exh. D
- That the transaction that led to the accrual of the amount claimed for in the plaint are dated 02/09/1987 for Kshs 100,000.00.

- 02/02/1987 for Kshs 50,000.00.
- 02/09/1987 for Kshs 400,000.00 which dates fall outside the period he was still the 1st defendant's Director, which bill matured long after he had left on 01/12/1987.
- It is his stand that he never instructed any of the two lawyers who entered appearance to act for him.
- Then he came to learn of the suit and judgment when Auctioneers came to attach his properties.
- That he has a good defence with triable issues.
- That the delay in the presentation of this application was due to the fact that he had no knowledge of the proceedings and moved swiftly to present applications with the earlier ones having been faulted twice on points of technicalities.
- That they have presented sufficient grounds to earn the relief they are seeking.

The plaintiff has moved to oppose that application on the basis of a replying affidavit sworn by one SRINIVASAN VENKATA RAMANI sworn on the 20th day of March 2005 and filed on the same date, annexures, and written skeleton arguments, by which the respondent indicated that they were replying entirely on the content of the affidavit. The salient features of the same are as follows:-

- That upon filing of the suit herein, summons to enter appearance were taken out. They were duly served as shown by the two Return of services both by one Samuel Odero. One filed on the 4th November 1989 and 4th December 1989. In the R/S of 4th December 1989, the 4th defendant was served on behalf of the applicant herein and another being the second and 3rd defendant, where as the one dated 4/11/1988 the 5th defendant.
- Vide paragraph 4, that he 4th defendant accepted service on his own behalf of the other defendants. The 1st, 2nd, 3rd and 4th defendant.
- The services yielded the filing of the entrance of appearance by annexures SVR 2.
- That the person served was a Co Director of the 3rd defendant and he was served in that capacity.
- Vide paragraph 8, thereof it is deponed that the application for summary judgment was served onto the defence advocates as shown by the R/S SVR 4, which application was allowed by this court vide the court order of 23rd June 1997.
- It is their stand that there was a defence on record which the court considered and found it not raising any reasonable triable issue.
- That the application does not lie under order 35 rule 10 CPR as there was no explanation as to why the advocate then on record failed to turn up for the hearing of the application for summary judgment.
- That the application for setting aside is an abuse of the due process of the court, as the remedy open to the applicant, herein should have been an application for review or an appeal.
- There are no criteria for setting aside demonstrated herein, more so when a period of 11 years had elapsed since the appearance had been filed.

- Vide paragraph 14 thereof, that the applicant 3rd defendant's indebtedness to the plaintiff is based on a continuing guarantee.
- That they rightly sued the 3rd defendant as there is proof of correspondences exchanged between the other share holders and the applicant.
- They content that the notice of execution was served on to the applicant 3rd defendant, and as such he had prior notice of the suit, but chose not to attend and the current move of filing of the current application is just to frustrate the execution of the decree and for this reason the plaintiff asks the court, to decline the relief being sought.
- The court, is urged to take into consideration the annexed exhibits SVR1, the return of service evidencing service of the summary judgment application SVR 2 the entry of appearances, annexure SVR 2 confirming that a defence had been filed, SVR 4 R/S for service of the notice to show cause why execution should not issue annexure SVR 5, the guarantee signed in favour of the plaintiff. Respondent, annexure SVR 6 and 7 being searches at the companies Registry showing that as at 4/8/1989 the applicant was still a Director and share holder of the 1st defendant. No oral highlights were made by the parties who relied on the documentation filed.

On the courts assessment of the facts on the record, as presented by the Rival arguments, it is evidence that all that the applicant herein is asking for is for the door to the seat of justice to be opened for him so that he can agitate his defence before any judgment is passed against him. He had come under order 35 rule 10 which read:-

“0.35 rule 10. Any judgment given against any party who did not attend at the hearing of an application under this order may on application be set aside on such terms as are just.”

Applying this provision to the arguments herein, it is clear that here is jurisdiction to set aside an *ex parte* judgment. A reading of the proceedings of 23/6/1997 is proof that the said summary judgment was entered *ex parte* as the defendants respondents did not attend court at the hearing either by themselves or the counsels who filed memorandum of appearance on their behalf. The yardstick that the court, may apply in setting aside such judgment, has not been provided in the provision. Both sides cited no case law as a guide. That notwithstanding this court, has no case law as a guide. That notwithstanding this court, has no doubt that the use of the word “May” in the said provision donates a discretion to this court, to decide whether to set aside or not. This being the case, this court had no doubt that the usual case law on the applicable yardstick for determining the courts exercise of its discretion in any matter would apply. These are numerous, decide by the Court of Appeal, and as dutifully followed by the superior courts. There is no harm in setting out a few herein. There is *the case of SHAH VERSUS MBOGO AND ANOTHER (1967) EA 116 whose principle is that: the courts’, discretion to set aside an *ex parte* judgement is intended to be exercised to avoid injustice or hardship resulting from accident, in advertence or excusable mistake or error but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice”* the case of ELITE EARTH MOVERS LTD VERUS KRISHNA BEHAL AND SOM (2005) IKR 379 a decision by Emukule J in which the learned judge ruled that “ *the discretion of the court to set a side an *ex parte* judgement is wide and flexible and it is exercised upon terms that are just”* The case of CMC HOLDING LTD VERSUS NZIOKI (2004) IKLR 173 a court of appeal decision which laid out the following guidelines namely:-

1. *Discretion must be exercised upon reason and judiciously.*
2. *It should not be exercised wrongly in principle neither should the court, act powersely on the facts.*
3. *It should be exercised to ensure that a litigant does not suffer in justice or hardship as a result of among other things an excusable mistake or error.*

4. It would not be proper use of such discretion if the court, turns its back to a litigant who clearly demonstrates such an excusable mistake, in advertence accident or error. Such an exercise of discretion would be wrong in principle.

5. The court, must consider not only the reasons why the defence was not filed or why the appellant (applicant) did not turn up for hearing but also whether the applicant has reasonable defence which is usually referred to as whether the defence if filed already or a draft defence is annexed raises triable issues”

Applying the above principles to the facts herein, it is clear that in order for the applicant to earn the relief he is seeking, he has to demonstrate the following:-

- 1. That if this courts’, discretion is not exercised in his favour he will suffer in justice or hardship.**
- 2. That failure to take action leading to the entry of summary judgment, in the manner entered against him was as a result of an accident, in advertence, excusable mistake or error.**
- 3. That he has not deliberately sought whether by evasion or otherwise, to obstruct or delay the cause of justice.**
- 4. That the delay and or reason for non-appearance has been explained.**
- 5. In the case of a defendant, that he has a reasonable defence with triable issues.**
- 6. That even if he has only one triable issue that can go to trial, he should be allowed to be heard.**

This court, has considered all the above in the light of the rival arguments herein, applies case law principles and proceeds to make the following findings;-

1. The reason that the learned judge gave for allowing the application for summary judgement was no response to the application for summary judgement by the defendants, none attendance at the hearing of that application and lastly failure to raise a reasonable defence. The 3rd defendants’ response to those findings has been that he was not aware of the proceedings and that the counsels who purported to act on his behalf had no authority to do so as he never gave them instructions to do so. The court, has perused the documentation relied upon by both sides and confirmed that service was effected on the 4th defendant who alledgely accepted service on behalf of all the defendants. It has not been deponed anywhere in the replying affidavit that other than being a Co Director the 4th defendant qualified to be an agent of the 3rd defendant to such an extend that the requirement for personal service, was thereby unnecessary in the absence of such demonstration, the 3rd defendants is entitled to demand his entitlement to personal service.

2. As for lack of instruction to the counsels who entered appearance and filed a general defence, this should have been demonstrated by getting a letter or a deponement in an affidavit from the said counsels to the effect that indeed the 3rd defendant did instruct or did not instruct them to act for him. This confirmation could have been sought for by either side and for this reason neither party will be penalized for not seeking the same.

3. The 3rd relates to the raising of triable issues. The 3rd defendant /applicant had relied on his resignation from the Directorship of the 1st defendant before the transactions giving rise to the claims were entered into. The stand of the plaintiff is that, despite resignation, the 3rd defendant was a shareholder in the first instance, and also by reason of a continuing guarantee he remained bound with all that had been transacted between the parties in pursuance of the terms and conditions of the guarantee. In the plaint vide paragraph 4 thereof, the 3rd defendant is described as follows:- “ 4 the 3rd defendant is a Director of the first defendant address for service is care of the

first defendant (service through the office of the advocate for the plaintiff)” . Having been sued as a Director, when in fact he had already ceased to be such, as per the documentation on the record, issue will arise as to whether he could be so bound. It is therefore the finding of this court that a triable issue exists for trial for the plaintiff to demonstrate how the debts bind the 3rd defendant even after resignation, on the one hand, and on the other hand, for the 3rd defendant to demonstrate how he is not bound by reason of transactions having taken place after he had resigned.

For the reasons given in the assessment, the court, is inclined to allow the 3rd defendants’ application dated 21st day of November 2003 and filed on 25th November 2003 and proceeds to make the following:-

1. By reason of the 3rd defendant having resigned from the Directorship of the 1st defendant as at the time the transactions leading to the claim were transacted in the first instance, and in suit filed in the 2nd instance, he was entitled to personal service of the summons to enter appearance upon him.
2. A triable issue has been raised as to whether the 3rd defendant having resigned as a Director can in can be bound by the transactions transacted after the resignation.
3. By reason of what has been stated above, in number 1 and 2 above, the summary judgement entered by this court, on 23rd June 1997 in so far as the 3rd defendant is concerned be and is hereby set aside for the reasons given.
4. The said 3rd defendant has 30 days from the date of the reading of this ruling to file and serve a defence.
5. Since the plaintiff ought to have ascertained the directorship of the 3rd defendant before suing him, on the one hand and since counsels who purported to appear for the 3rd defendant ought to have ascertained the correct position before entering appearance on behalf of the 3rd defendant. Costs will be in the cause.
6. After compliance with number 4 above parties will proceed according to law.
7. In default of number 4 above parties to proceed according to law.

DATED, READ AND DELIVERED AT NAIROBI THIS 17TH DAY OF JULY 2009.

R.N. NAMBUYE

JUDGE