

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 273 of 2009

TERRAZZO ENTERPRISES PLAINTIFF/RESPONDENT

VERSUS

RAJNI VELJI SHAH DEFENDANT/APPLICANT

RULING

The chamber summons dated 4th August 2009 seeks for orders that there be a stay of execution and the default judgment entered on 25th May 2009, with consequential orders/ proceedings be set aside and the defendant is given unconditional leave to defend this suit.

The brief summary of the facts in support of this matter are that the defendants/applicant came to know of the exparte judgment on 30th July 2009, when person purporting to be representatives of Prodigy Commercial Agencies visited his premises and purported to proclaim the motor vehicles in his compound and other assorted house hold goods. The defendant contends that the default judgment entered against him on 25th May 2009 was irregularly obtained because he was not served with summons to enter appearance or a copy of the plaint.

It is alleged then the plaintiff colluded with the process server so as to obtain default judgment and deny the defendant an opportunity to defend the suit. The affidavit of service sworn by **Nzuki Musyoki** on 21st May 2009 is also faulted because even the employees of the plaintiff who were present at the place where he alleges to have served the summons deny having seen him. The service of the notice of the entry of the judgment is also challenged because it does not even bear the defendants' postal address. This shows that the plaintiff deliberately used the wrong address to avoid bringing to the defendants' notice the existence of the case. Moreover the defendant could not have failed to file a defense as he has demonstrated in the draft defense that his defense is strong and meritorious.

The application is also supported by the affidavit of **Navjot Singh Shah** an employee of the defendant who claims that he was stationed at the shop along Kenyatta Avenue where the process server purportedly states the summons were served. The deponent states that he was present on the material day and never saw the process server seeking to effect service of any court documents upon the defendant who is one of the directors. There is also the affidavit of the defendant sworn on 4th August 2009, by which he has denied having been served with the summons. He has annexed copies of the documents especially the certificate of posting of the notice of entry of judgment which was sent to the wrong address. He annexed the post office Renters Authority Card to confirm his own address. There was a letter sent by the plaintiff through a wrong address but the same copy was faxed to the defendant that is how he received it. The defendant also denies the claim by the plaintiff as per the draft defence.

This application was opposed by the plaintiff/respondent. He relied on the affidavit of Gupal Patel sworn on 16th September 2009. Counsel for the plaintiff maintained that service was properly effected upon the defendant as per the affidavit of service because it is not even denied that the defendant was not at his place of work when the service was effected. Counsel also maintained that notice of entry of judgment was sent to the defendants' known address through a registered mail. Counsel submitted that even when the plaintiff and defendant were doing business together, a letter was sent to the defendant in

December 2004, through the same address. Therefore the plaintiff used the known address of the defendant to notify him of the entry of the judgment. As regards the draft defence the plaintiff has not demonstrated any triable issue.

The defendants dealt with the plaintiff as the principle in the contract for the renovation of his mother's premises. There was a letter from the Architect which confirmed the workmanship was satisfactory. In any event it was the defendant who paid the cheques for part of the work but failed to pay the balance. If the defendant's defence as he claims is that the contract was between the plaintiff and the defendant's mother he should apply for third party notice to be issued against his mother.

The above is the summary of the salient issues raised in this application. This is an application to set aside a default judgment, the principles to bring bear and the check list to consider are well settled in many decisions by the Court of Appeal, especially in the ancient case of **Shah vs. Mbogo & Another 1967 EA 116**. Firstly the court has unfettered discretion to set aside an ex parte judgment in the interest of justice and to avoid injustice or hardship which may result from an accident inadvertence, or excusable mistakes or error. In so doing the court should guard against assisting a person who is deliberately whether by evasion or otherwise trying to obstruct or delay the cause of justice.

The issues to determine in this application is whether the default judgment was regularly obtained or whether the defendant by seeking to set aside the ex parte judgment is trying to delay the cause of justice. I have read the affidavit by the defendant and his employee including the annexures thereto especially the address used to send the notice of the entry of the judgment. The defendant claims that was the wrong address and annexes a copy of his renter box. The plaintiff insists that was the correct address because he had previously addressed a letter which was received by the defendant. The defendant claims that letter was sent by fax and what he received, was a faxed copy.

I have also considered the draft defence; it is evident that there are triable issues raised in that defence. This therefore lends credence to the contention by the defendant that had he been served with the summons to enter appearance, he would not have failed to defend the claim against him. The issues both raised in the plaint and the defence can only be determined through trial for ends of justice to be met in this matter. In the circumstances the default judgment should be set aside and all the consequential orders so that the court can determine the merit of the matter.

The defendant is given leave to file and serve the Memorandum of appearance and defence within ten (10) days. The costs of this application will be in the cause.

RULING READ AND SIGNED ON 20TH NOVEMBER 2009 AT NAIROBI.

M.K. KOOME

JUDGE