



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

**Civil Suit 479 of 2007**

1. JOHNSON WACHIRA MUGO
2. MOSES WANGAI NJOROGE
3. ELIZABETH SAVETH WANGAI
4. FLORENCE SOILA NGOSSORR.....PLAINTIFFS

**VERSUS**

**SASANET INVESTMENT CO-OPERATIVE  
SOCIETY LIMITED.....DEFENDANT**

**R U L I N G**

By Chamber Summons dated 19<sup>th</sup> November, 2007, Sasanet Investment Co-operative Society Limited who is the defendant in this suit, has come to this court seeking orders *inter alia*:

- (i) That the ex parte judgment entered against it in default of appearance and the consequential decree, and all the subsequent ex parte orders including the injunction order given on the 8<sup>th</sup> November, 2007 be set aside and/or discharged.
- (ii) That the defendant be granted leave to file his defence within such period as the court may deem fit.
- (iii) The costs of the application be borne by the plaintiff.

The application is supported by grounds stated on the body of the application as follows:

- (i) That the defendant has never been served with summons to enter appearance, or the Plaintiff herein and the defendant is hence entitled to the setting aside of the ex parte judgment *ex debito justitiae*.
- (ii) The execution of the ex parte judgment and decree issued against the defendant is already in the process.
- (iii) Orders of injunction have been granted against the defendant over properties that do not belong to it and over which properties the defendant has no authority or control.

(iv) The defendant has a very strong defence to this suit, with overwhelming chances of success.

The application is supported by an affidavit sworn by Sheila Njeri Thiong'o on the 19<sup>th</sup> November, 2007, a further affidavit sworn by Sheila Njeri Thiong'o on the 30<sup>th</sup> November, 2007, and a further affidavit sworn by Eunice Njoki Ndung'u on 30<sup>th</sup> November, 2007.

Sheila Njeri Thiong'o who claims to be a member of the Management Committee of the defendant, swore that the defendant was never served with any summons to enter appearance, either on 15<sup>th</sup> September, 2007 or 17<sup>th</sup> September, 2007 or at all, but only came to learn of the suit through an advertisement in the Daily Nation of 15<sup>th</sup> November, 2007. She deponed that the defendant society operates from Standard building and has never had offices or operated from Teleposta Towers.

Sheila Njeri Thiong'o conceded that between January 2007 and October 2007, she was an employee of Sasanet Limited, a company housed at Teleposta Towers, which she maintained was a totally different company and a distinct legal entity from the defendant. She maintained that any receipts issued by Sasanet Limited were receipts for monies paid to Sasanet Limited and not to the defendant. She specifically denied having personally been served with any summons to enter appearance on behalf of the defendant, at Teleposta Towers on 17<sup>th</sup> September, 2007. She maintained that she was off duty the whole of that week as she was studying and preparing for her examinations at the University of Nairobi. She maintained that she never worked from the defendant's offices at Standard building but only attended management committee meetings there.

Eunice Njoki Ndung'u who deponed that she is employed as a receptionist with Sasanet Limited at Teleposta Towers in Nairobi, swore that she was on duty on the 17<sup>th</sup> September, 2007 and that no process server approached her with regard to service of summons. She asserted that the defendant did not have any offices at Teleposta Towers.

Upon learning of the suit through the newspaper, the defendant instructed an advocate, who perused the court file and advised the defendant that an ex parte judgment had already been entered against the defendant for Kshs.18,337,815.65 and that orders of temporary injunction have been issued against defendant restraining it from disposing off various properties. The defendant denied having any Directors or Principal Director, and maintained that the properties listed in the order of injunction do not belong to it.

The defendant further denied owing any money to the plaintiffs. It contended that it never entered into any investment contract or received any monies from the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs and maintained that the allegation that the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs paid any money to the defendant in the year 2006 was totally false as the defendant was only registered in January 2007.

As regards the 1<sup>st</sup> and 4<sup>th</sup> plaintiffs, the defendant conceded that they were members of the society, and maintained that their claim related to their dealings with the society as such members. The defendant therefore contended the 1<sup>st</sup> and 4<sup>th</sup> plaintiffs' claim ought to have been pursued under the Co-operative Societies Act (Cap 490, Laws of Kenya) and

not through the court. The defendant therefore contended that it has a very good defence to the plaintiffs' claim, which defence has overwhelming chances of success.

Miss Magana who appeared for the defendant submitted that under Order V, Rule 2 of the Civil Procedure Rules, service upon a Corporation should be done upon the Principal Officers and that according to the defendant's by-law No. 48, the Principal Officers were the Chairman, Vice Chairman, Treasurer and the Secretary. She maintained that Sheila Njeri Thiong'o was not a Principal Officer and any service upon her was defective. She therefore urged the court to set aside the ex parte judgment given the lack of service and the fact that the defendant has a good defence to the plaintiffs' claims.

The plaintiffs responded to the defendant's application through a replying affidavit sworn by Moses Wangai Njoroge, who is the 2<sup>nd</sup> plaintiff. He challenged the authority of Sheila Njeri Thiong'o to swear an affidavit on behalf of the defendant. He deponed that he personally dealt with Sheila Njeri Thiong'o, who was the person in charge of marketing and promoting the defendant. He maintained that he has personally encountered Sheila Njeri Thiong'o in the defendant's office at Teleposta Towers on several occasions. He exhibited a letter (MWN-2) from the Ministry of Cooperative Development & Marketing, showing that the registered offices of the defendant are Teleposta Towers ground floor, and Standard building, Wabera Street, Nairobi and that Sheila Njeri Thiong'o was a marketer for the defendant.

Relying on the affidavit of service sworn by Richard K. Macharia, the 2<sup>nd</sup> plaintiff maintained that Sheila Njeri Thiong'o was served with summons to enter appearance, on Monday 17<sup>th</sup> September, 2007. He further deponed that a notice of entry of judgment was forwarded to the defendant through its registered address on the 19<sup>th</sup> of October, 2007.

As regards the defence put forward by the defendant, the 2<sup>nd</sup> plaintiff deponed that the same was devoid of merit and a sham merely used as a ploy to delay the plaintiffs from recovering the funds embezzled by the defendant. He maintained that the defendant has no defence to the 1<sup>st</sup> and 4<sup>th</sup> plaintiff's claim which it has substantially admitted. He contended that the defendant having breached its agreement with the plaintiffs and suspended further payments, the entire debt owed to the plaintiff became due. He further averred that the plaintiffs were not members of the defendant, but investors who lent the defendant money and who subsequently became creditors, when the defendant breached the agreement. The plaintiffs were not therefore, subject to the Cooperative Societies Act, Cap 497 Laws of Kenya.

The 2<sup>nd</sup> plaintiff further deponed that although the defendant alleged it was not in existence prior to January 2007, it had commenced business prior to that date as evidenced by the lease agreement attached to the defendant's supporting affidavit. He explained that although payments were made to the defendant and investment agreements signed with the defendants, receipts issued by the defendant were headlined Sasanet Limited. In this regard, the 2<sup>nd</sup> plaintiff relied on receipts issued to the 4<sup>th</sup> plaintiff headed Sasanet Limited for Kshs.5 million, which amount is acknowledged by the defendant in the proposed defence.

Mr. Thuita, who argued this application on behalf of the plaintiffs, drew the court's attention to annexure SNT 10 to the further affidavit of Sheila Njeri Thiong'o which showed approval of request for leave from 17<sup>th</sup> October, 2007 to 23<sup>rd</sup> October, 2007 and the affidavit of service sworn by Richard K. Macharia on the 11<sup>th</sup> October, 2007 which showed that service was effected on the defendant, through delivery of summons on Sheila Njeri Thiong'o on the 17<sup>th</sup> September, 2007 at Teleposta Plaza, ground floor. He urged the court to find that Sheila Njeri Thiong'o was on duty at Teleposta Towers on 17<sup>th</sup> September, 2007.

From the court's record, it is evident that ex parte judgment was entered against the defendant and in favour of the plaintiffs on the 17<sup>th</sup> October 2007, following a request made by the plaintiff's advocate on the 11<sup>th</sup> October 2007. The ex parte judgment was grounded on an affidavit of service sworn by a process server Richard K. Macharia on 11<sup>th</sup> October 2007 in which affidavit the process server swore that he served the defendant with summons to enter appearance on the 17<sup>th</sup> September 2007.

The defendant has completely denied having been served with any such summons. The question therefore is whether the defendant was actually served with the summons, and if so whether the service was proper.

The process server deponed in his affidavit that he served Sheila Njeri Thiong'o who was identified to him as the Manager in charge of Operations and Marketing by one Eunice Njoki, a receptionist. He identified the place of service as Teleposta Plaza, Ground Floor, Kenyatta Avenue, Nairobi.

I have considered the replying affidavit and the further affidavits. Whilst Sheila Njeri Thiong'o denies

having been a principal officer of the defendant contending that she is only a member of the management committee, annexure MWN-2 to the affidavit of Moses Wangai Njoroge, which is a letter from the Ministry of Co-operative Society under which the defendant is registered, clearly shows Sheila Njeri as a marketer and promoter of the defendant. Secondly, although Sheila Njeri in her affidavit swears that at the time of the alleged service, she could not have been at the defendant's office as she was off-duty studying and preparing for an examination, annexure SNT-10 to her affidavit exhibited in support of contention, shows that she was off-duty from 17<sup>th</sup> October, 2007 to 23<sup>rd</sup> of October, 2007. That letter does not, therefore, confirm that she was away on 17<sup>th</sup> September 2007, the date of the alleged service.

Thirdly, although it was contended on behalf of the defendant, that it did not have any offices at Teleposta Towers and that its offices are situated at Standard Building, Wabera Street, it is obvious from annexure MWN-2 to the replying affidavit, that the defendant's registered offices are at both Teleposta Towers, ground floor, and Standard Building, Wabera Street. The contention of the defendant that it had no offices at Teleposta Towers cannot therefore, be true and must be rejected.

It is evident that in the affidavit of service, the process server referred to "Teleposta Plaza, Ground Floor". I find however that the only building along Kenyatta Avenue known as "Teleposta" is "Teleposta Towers" and not "Teleposta Plaza". I find therefore, that the building described by the process server as "Teleposta Plaza" is actually "Teleposta Towers".

The process server has described how Sheila Njeri Thiong'o was identified to him by one Eunice Njoki, a receptionist at the defendant's offices. What the process server deponed to, is consistent with what is indicated in annexure MWN-2 to the replying affidavit, i.e. that Sheila Njeri Thiong'o is a Promoter and Marketer of the defendant. The annexure also confirms that Sheila Njeri Thiong'o and all promoters of the company were working for Sasanet Limited, thereby confirming that there was a connection between the two companies. Interestingly, the defendant has not raised any issue relating to Sasanet Limited in the proposed defence. The affidavit of service is also consistent with the further affidavit sworn by Eunice Njoki Ndungu wherein she depones that she is a receptionist of the defendant.

In the light of the above, I do believe and accept the evidence of the process server that he did serve the defendant, Sheila Njeri Thiong'o with summons to enter appearance. I am satisfied that the said Sheila Njeri Thiong'o was a Principal Officer of the company, given her position as a Marketer and Promoter of the company. I find that service of the summons to enter appearance was properly effected upon the defendant on 17<sup>th</sup> September 2007, and that the defendant had not entered any appearance or filed a defence by 17<sup>th</sup> October 2007. Consequently, the ex parte judgment entered against the defendant was regular and proper, the defendant having failed to establish any plausible explanation for the failure to enter appearance or file defence.

I take note of the statement made by Duffus P. in the case of **Patel -vs- EA Cargo Handling Services Limited [1974] EA 75**, that a court will not usually set aside a regular judgment, unless it is satisfied that there is a defence on the merits, and that defence on the merits does not mean one that must succeed but rather, one which raises a triable issue founding a *prima facie* defence which should go to trial for adjudication.

I have perused the proposed defence, annexed to the affidavit of Sheila Njeri Thiong'o. The proposed defence does raise various issues, for instance, whether there was any contract between 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs and the defendant; whether the defendant received any money from the 2<sup>nd</sup> or 3<sup>rd</sup> plaintiffs; whether the 1<sup>st</sup> and 4<sup>th</sup> plaintiffs were members of the defendant or investors of the defendant; whether the plaintiffs suit is bad in law or is an abuse of the court process. The merits of the issues aside, the proposed defence raises a *prima facie* defence which should go to trial. Nevertheless, given the fact that the defendant has not adequately explained its failure to file its defence to the plaintiffs' claim; the fact that the defendant has partially admitted receiving money from the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs; the fact that the defendant appears to have suspended its operations; it is necessary that this court sets aside the ex parte judgment on suitable terms.

I note that a prohibitory order was issued by the court in respect of various properties alleged to have been recently registered in the name of Michael Chege Njoroge, alleged to be a Principal Director of the defendant. Although the defendant contended that it has no Principal Director named Michael Chege Njoroge, it is evident from annexure MWN-2 (referred to above), that one Michael Chege was indicated as a Promoter and Chairman of the defendant. The defendant's contention that it has no connection with Michael Chege Njoroge or the identified properties cannot hold. The defendant cannot purport to object to the order on behalf of an unknown person. It is interesting that the said Michael Chege Njoroge has not come forward to object to the prohibitory order notwithstanding the publication of the order in the newspaper.

Given the circumstances of this case, I find it appropriate that the prohibitory order restraining the defendant or Michael Chege Njoroge or any other person from dealing with these properties remain in force. Accordingly, I do hereby set aside the ex parte judgment entered against the defendant on 17<sup>th</sup> October, 2007 on condition that the prohibitory order issued by this court on the 8<sup>th</sup> November, 2007 by way of a temporary injunction shall remain in force pending the hearing of this suit.

It is further ordered that the defendant shall file and serve its defence within 10 days from the date hereof. The defendant shall further pay all thrown away costs and costs of this application. Orders accordingly.

Delivered this 28<sup>th</sup> day of January, 2008.

**H. M. OKWENGU**

**JUDGE**