REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 153 of 2001

MADAN MOHAN AGGARWAL (Trading as ESSO

MOTOR SALES & SERVICES STATION)……. PLAINTIFF

Versus

SAMWEL KARIMI MUBIA……..…….. 1ST DEFENDANT

FRANCIS NDICHO GATHOGO ……. 2ND DEFENDANT

MARGARET WANGU GICHUKI …….…….. OBJECTOR

RULING

The plaintiff sued the first defendant as principal debtor in respect of a hire purchase agreement for the purchase of motor vehicle Registration No. KAG 114 A. The second defendant was sued as a guarantor to that agreement. The plaintiff prayed for judgment jointly and severally against both defendant for Kshs.1,496,975. The application is subject of this ruling is brought by the second defendant by chamber summons dated 29th January 2007. That application is brought under Orders IXA Rules 9, 10 and 11 Order XXI Rule 22(i) of the Civil Procedure Rules. The second defendant seeks a prayer to set aside judgment entered against him and the decree hereof. In support of that application the second defendant stated that it was on or about 26th January 2007 that he received a telephone call from Margaret Wangu Gichuki who is an objector herein who informed him about this case. I have gone through the court file and I find that the second defendant appointed the firm of advocates Kagondu & Mukunya Advocates. That firm of advocates filed a notice of appointment of advocates in this case on the 7th of December 2006. With that in mind it does not follow why the second defendant would claim to have known about the existence of this case in January 2007. It also begs a question what relationship there is between the second defendant and Margaret Wangu Gichuki. Margaret Wangu Gichuki filed an objection in this matter when her motor vehicle was attached in execution of the decree in this matter. The second defendant further deponed that he perused the court file on receiving the aforesaid information where he found that judgment had been entered against him on 20th January 2005. That judgment was in default of appearance. He denied even having been served with summons and plaint in this matter. He claimed that the deponent of the affidavit of service had given false information. He indicated that he would require that process server to be cross examined. At the hearing of this case, the second defendant did not seek the cross examination of the process server. Second defendant attached to this affidavit a certificate of death which he said proved that the first defendant was deceased at the time this case was filed. In support of that application counsel for the second defendant relied on the affidavit in support of the application and also drew the courts attention to the annexed proposed defence. In that defence the second defendant denied the plaintiff's claim. Further he averred that the motor vehicle the subject of the higher purchase agreement had been repossessed by the plaintiff forcefully. That such repossession was without any legal right. In the defence it is alleged that the attachment was on 15th January 1996. He alleged the vehicle was being used by the plaintiff in his business. That vehicle was being used prior to its attachment as a matatu collecting on a daily basis kshs.6000. In his defence has counter claim for the

amount of that income from the date of repossession. The second defendant swore further affidavit where he alleged without elaborating that the affidavit of service relating to the service of summons and plaint on his was defective. Further he referred to the minute in the court file dated 20th January 2005 where the deputy registrar entered judgment against him in default of appearance and that judgment was indicated as interlocutory judgment. The second defendant faulted that entry of judgment by saying since it was only interlocutory judgment the case should have gone for formal prove. The second defendant did also allege without giving the basis of the allegation that the process server who swore the affidavit of service of summons and plaint was not indeed an authorized process server. The application was opposed by the plaintiff who swore an affidavit in reply. In that affidavit the plaintiff deponed that the second defendant is sued as a guarantor to the first defendant. The plaintiff also confirmed that the second defendant was served with the court process. That deposition was confirmed by the process server Davis Wachira who swore a further affidavit and confirmed that the second defendant had been served on 28th August 2004 and that the 2nd defendant was served after being identified by a driver of Esso Motor sales and services station. That the second defendant accepted service but she refused to sign an acknowledgment. The second defendant relied on the following cases CHEMWOLO & ANOTHER vs KUBENDE (1986) KLR, WAWERU vs NDIGA CIVIL APPEAL NO. 64 OF 1982. These cases made a finding that the court has unlimited discretion to set aside exparte judgment. The court commented that it should always be the concern of the court to do justice to the parties and in so doing would not impose conditions on itself to fetter the wide discretion of setting aside judgment. The second defendant it should be noted also argued that since the first defendant was deceased this fact defeated the plaintiff's claim. It is correct to state that the court has a wide discretion in setting aside a judgment entered exparte. Where the court finds that service of summons and plaint were not effected as required under the law a party would in that case be entitled as of right to the setting aside of exparte judgment. Where however judgment is regularly entered the court would only set aside exparte judgment where the defendant was to show that he had a prima facie defence to go to trial. That was the holding of the case CENEAST AIRLINES LTD v KENYA SHELL LTD (2000)2 EA ;

"*The court had a wide discretion to set aside a judgment on terms that were just but it would usually set aside a regular judgment unless it was satisfied that there was a prima facie defence which should go to trial for adjudication; PATEL vs EA CARGO HOLDING (1974) EA 75 applied. In this instance, the fact that Kshs. 21 438 007 – 95 claimed by the respondent included value added tax whereas it appeared that the products supplied were exempted from value added tax on the material time, raised a triable issue that should have moved the court to exercise its discretion in the appellant's favour."*

The second defendant merely alleged that he was not served. He did not seek to cross examine the process server. The process server in addition to swearing the affidavit of service swore a further affidavit detailing the identity of the person who pointed out the second defendant to him. That affidavit considered together with the fact that a notice of appointment of advocates was filed on behalf of the second defendant on 6th December 2006. I make a finding that the second defendant was served with the summons and plaint. In view of that finding in need to consider whether the second defendant has raised a *prima facie* defence. The second defendants defence mostly contains denial of the plaintiff's claim. Additionally the second defendant counter claimed that the 1st defendant's motor vehicle was repossessed by the plaintiff. In making that allegation the second defendant alleged that the plaintiff's claim had been satisfied by that attachment. In my view such an allegation cannot necessary lead to the setting aside of judgment. It is essentially raising a question of accounts. The second defendant could perhaps have applied for accounts to be given by the plaintiff. The allegation that the plaintiff's claim is defeated by the death of the first defendant is rejected. This is because the plaintiff's claim was jointly and severally against both defendants. Jointly and severally is defined in the Black's Law Dictionary as '(of liability, responsibility) apportionable either among two or more parties or to only one or a few select members of the group'. The definition shows that the plaintiff's whole claim is recoverable against either defendant. The claim against second defendant is that he was a guarantor to the first defendant. The fact that the first defendant is deceased does not defeat the plaintiff's claim. In submission the second defendant's counsel argued that judgment should be set aside because the plaintiff had not served a notice as required by Order XXI Rule 6 of the Civil Procedure Rules. That Order provides:-

"*Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution*

That rule provides that no execution can proceed where judgment has been entered in default of appearance or defence without a notice being issued to the defendant. Failure to give that notice does not go to the root of the judgment. It cannot be a basis for setting aside judgment. At most it would simply lead the court to require a judgment debtor to be served before execution. The last issue to consider is whether the entry of interlocutory is a basis for setting aside judgment as sought. I am of the view it is not. This is because the plaintiff's claim is liquidated claim not requiring formal proof. The fact that the Deputy Registrar stated that the judgment was interlocutory is not fatal to that judgment. It is a mere irregularity. The end result therefore is that the second defendant's chamber summons dated 29th January 2007 is hereby dismissed with costs to the plaintiff.

DATED AND DELIVERED THIS 23RD DAY OF JUNE 2008

MARY KASANGO

JUDGE