



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 269 of 2007

STEPHEN MUTURI.....PLAINTIFF

VERSUS

UNIBASE PETROLEUM LIMITED.....DEFENDANT

RULING

The application under consideration was filed by the Defendant on 30th April, 2008. It is a Chamber Summons application dated 29th April 2008, expressed to be brought under Order IXA rule 3, 10 & 11 of Civil Procedure Rules and Section 3A of Civil Procedure Act. There are three prayers sought in this application two of which are mute. The pertinent prayer is prayer 3 which states:

3) THAT this honourable court be pleased to set aside the default judgment and decree of this court and all consequential orders made thereon and grant leave to the Defendant to defend the present claim on merits.

The grounds for the application are

- a) The Defendant/Applicant has never been served with summons to enter appearance in this suit.**
- b) The Defendant/Applicant has a good defence to the claim, being that it does not owe the Plaintiff the amounts claimed or at all, and he seeks leave to formally defend the claim on merits.**
- c) The Plaintiff/decree-holder has already proceeded to take out execution processes for the default judgment and decree herein, which would defeat the present application if stay of execution is not granted.**
- d) It is in the interest of justice and fairness that this application be allowed.**

The application is further supported by the affidavit of ERIC K. MWENDA also of even date. I have considered the contents of the said affidavit.

The application is opposed. The Plaintiff has sworn a replying affidavit dated 14th May, 2008 opposing the Defendant's application. I have also considered the contents of this affidavit.

When the application came up for hearing, Mr. Mugambi argued it on behalf of the Defendant while Mr. Thangei opposed the application on behalf of the Plaintiff/Respondent. I have considered the submissions by both counsel together with the cases relied upon. The Defendant's contention is that it's director was never served as claimed in the affidavit of service sworn by the process server Elijah Chepkwony. At paragraph 5 of the said affidavit, the process server deposes

"5. THAT on the same day I served the said summons and a copy of plaint upon Mr. Eric Mwenda Kanyuuru who accepted service in his capacity as the Director of Unibase Petroleum Limited but he refused to sign at the back of the original copy return herein to this honourable Court duly served"

Erick M. Kanyuru has sworn the affidavit in support of the application and has denied being served, or having an

employee by name Shadrack Ndekere. He has also denied being based at Crystal Motors premises. The Respondent's have merely asserted the averments by the process server to maintain their position that there was service.

Issue is whether there was service or not. The principles which govern the applications of this nature are now trite.

A person serving process must state in a return service the time when the service was effected on the person served; the manner in which the summons were served; the name of the person who identified the person served to him and now he came to know the identifying person; the place where the service was effected and finally whether the person served was required to acknowledged service by signing and whether he complied. See **PATEL VS E. A. CARGO HANDLING SERVICES LIMITED [1974] E.A 75, RAPANDO VS OUMA & 6 OTHERS [2004] KLR 115.**

Where there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular one and the court must set aside such a judgment *ex debito justitiae*. When setting aside such a judgment, the court will not be exercising any discretion whether or not to do so, but will set aside such a judgment as a matter of Judicial duty, in order to uphold the integrity of the judicial process itself. When setting aside an irregular judgment, the court will not concern itself with whether or not the Defendants have a defence on the merits. See **GANDHI BROTHERS VS H. K. NJAGE T/A H. K. ENTERPRISES MILIMANI, HCCC NO. 1300 OF 2001 and REMCO LIMITED VS MISTRY JADRA PARBAT & CO. & TWO OTHERS MILIMANI HCCC NO. 171 OF 2001.**

I have considered the affidavit of service on record. It has been heavily contested by the Defendant and same was not controverted as the process server did not swear an affidavit in reply thereof. The fact of the matter is that the process server did not know the Defendant's Director Eric Kanyuru before the alleged service. Neither did he know the person who allegedly identified Eric to him. The process server did not state how he came to meet the alleged employee of the Defendant Company. He did not describe the place he met with him neither did he give his address. Regarding the place of service the process server is not clear how the offices he identified as belonging to Crystal Motors were also the offices of Unibase Petroleum Limited. The Defendant Director has an oath denied that the offices of the Defendant Company have even been located within the offices of Crystal Motors Limited. As earlier stated that denial has not been controverted. It is quite clear that the process server did not effect service as required and that the service was improper and cannot stand. Since the service of the summons was not properly done, the ex-parte judgment should be set aside *ex-debito justitiae* together with all consequential orders.

The issue of whether the Defendant has a good defence should not even be considered at this stage. The Defendant had a right to be served with the summons once that right was taken away from him, the Court must restore the integrity of its process by setting aside all orders obtained on the basis of the improper service. Having come to this conclusions I make the following orders:

- 1) The application dated 29th April, 2008 is allowed.
- 2) The ex-parte judgment entered in this case be and is hereby set aside together with the decree and all other consequential orders.
- 3) The Defendant is granted 14 days within which to file and serve it's statement of defence.
- 4) The costs of the application shall be borne by the Respondent.

Dated at Nairobi this 4th day of July, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of:

N/a Mr. Mugambi for Applicant

N/a Mr. Thangei for Respondent

LESIIT, J.

JUDGE