REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 634 of 2007

JOHN KAMAU NJUGUNA……………………..1ST PLAINTIFF

MARGARET WANJIRU CHEGE…….………..2ND PLAINTIFF

MERCY NYAMBURA KANYARA…....……….3RD PLAINTIFF

MARY NJERI MBURU…………………………4TH PLAINTIFF

NDUNYU WA MWANGI….…………………….5TH PLAINTIFF

- VERSUS –

EMILIO MWANGI

T/A CIRCUIT INVESTMENT………………..1ST DEFENDANT

MUTUMA D. KIBANGA……………………..2ND DEFENDANT

R U L I N G

The defendants, Mutuma D. Kibanga Advocate, and Emilio Mwangi made an application under the provisions of ***Order IXA Rule 10*** and ***Order XXI Rule 22*** of the ***Civil Procedure Rules*** seeking orders of the court to set aside the default judgment entered on 13th February 2008 together with all the consequential orders issued subsequent thereto. Pending the hearing and determination of the application, the defendants sought stay of execution of the decree herein. The application is supported by the annexed affidavit of Dennis Mutuma Kibanga and Emilio Mwangi. The grounds in support of the application are on the face of the application. The defendants contend that they were not served with summons to enter appearance as alleged by Bernard Kinyanjui and Albert Birundu, the two process servers, who swore affidavits of service filed in court. The defendants assert that the said affidavits of service are mere fabrications. The defendants state that they have a good defence which ought to be heard on merits in a full trial. They were of the view that if the said judgment is allowed to stand, they would suffer great injustice and hardship.

The application is opposed. Mary Njeri Mburu, the 4th plaintiff, swore a replying affidavit in opposition to the application. In the said affidavit, the 4th plaintiff set out the circumstances that lead to the filing of the suit against the defendants. She deponed that the plaintiffs entered into an agreement with the 1st defendant after which the plaintiffs invested colossal sums of money with the said defendant on the understanding that they would get returns for their investments. She deponed that it was after they had handed over the said amounts to the 1st defendant that they discovered that the defendants were in fact operating a Pyramid Investment Scheme. When they sought refund of their monies, the defendants went underground. She deponed that the defendants were indeed served with summons to enter appearance as was evidenced by the action the 1st defendant took after becoming aware of the suit. She swore that the proposed defence of the defendants failed to raise any issue capable of being referred to trial. She was of the view that the said defence consisted of mere denials and did not controvert the averments made by the plaintiffs in their plaint. She urged the court to dismiss the defendants' application with costs.

At the hearing of the application, I heard the rival arguments made by Mr. Mugambi on behalf of the defendants and by

Mr. Mungai on behalf of the plaintiffs. I have read the pleadings filed by the parties in support of their respective opposing positions. I have also carefully considered the submissions made before me by the above mentioned counsel. The issue for determination by this court is whether the defendants established sufficient grounds to enable this court set aside the ex-parte judgment. The principles to be considered by this court in determining whether or not to set aside ex-parte judgment are well settled. Where it is established that there was no proper service, this court has no alternative but to set aside such judgment *ex debito justiticiae* (see ***Kanji Naran –vs- Velji Ramji (1954) 21 EACA 20***). The court has no discretion other than to set aside the ex-parte judgment. Where it is established that the defendant was served, this court has unfettered discretion to set aside the ex-parte judgment obtained in default of appearance, provided that in so doing, no injustice is occasion to the opposing party. The discretion to set aside exparte judgment is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice (see ***Shah –vs- Mbogo [1967] EA 116***). Finally, the court must be satisfied that the defendant has a good defence on merits (see. ***Maina –vs- Mugiria [1983] KLR 78)***.

In the present application, the defendants forcefully argued that they were not served with summons to enter appearance. I read the affidavits of service sworn by Bernard Kinyanjui. It was evident from the said affidavit that the process server was not known to the defendants prior to the date of service. The process server deponed that he served the 1st defendant after having a conversation with him via mobile phone. The said process server swore that he contacted the 1st defendant by mobile phone No.0722-581388. He deponed that he agreed to meet with the 1st defendant at Dove Cage Restaurant. He met the 1st defendant at the said restaurant and served him with summons to enter appearance. The process server swore that he was directed to the table where the 1st defendant was sitting by a guard at the said restaurant.

As regard the 2nd defendant, the process server deponed that he served him at his offices at Room 417, 4th floor, Ruprani House, Moktar Daddah Street, Nairobi. According to the process server, both defendants declined to sign on the originals of the summons to enter appearance in acknowledgement of their acceptance of service. On their part, the 1st and 2nd defendants vehemently denied that they were so served with the summons to enter appearance. The 2nd defendant stated that at the material time he was out of town and was not therefore at his offices. I have carefully analysed the conflicting affidavit evidence regarding whether the defendants were served with summons to enter appearance by the said process server. My instinct and my logical reasoning tells me that the defendants were indeed served by the process server. The affidavit of service has elaborated in great detail the step by step action that the process server took to secure service of the summons upon the defendants.

The information which the process server claimed he was given by the defendants as he was servicing them was corroborated by the affidavits sworn by the defendants in support of the present application. For instance, the process-server deponed that the 1st defendant directed him to the offices of the 2nd defendant. The 1st defendant had informed the process server that the 2nd defendant was his lawyer. The existence of the advocate-client relationship between the 1st and 2nd defendant has not been denied by the said defendants. The process server further noted that the 2nd defendant had informed him that he *(the 2nd defendant)* made part payment of the amount then owed to the plaintiffs. This fact is confirmed by the affidavit of the 4th defendant, sworn in reply to the plaintiffs' application.

It is therefore evidence that there is a high probability that the defendants were duly served. However, a little doubt was raised when the process server confirmed that he did not personally know the defendants prior to the date when he allegedly served them. In such circumstances, the process server was required to indicate in his affidavit of service the identity of the person who pointed the defendants out to him. It is probable that the process server served persons who were impersonating the defendants. The fact that the said alleged defendants did not acknowledge receipt thereof by signing on the reverse of the original summons, clearly points to the possibility that there could have been a case of mistaken identity. I will reluctantly resolve this doubt in favour of the defendants.

Further, the plaintiffs pleaded in their plaint that the monies which they deposited with the defendants were refunded to them less the interest which they were promised by the defendants. (*See Paragraph 11 of the plaint)*. In her replying affidavit, the 4th defendant acknowledged the fact the plaintiffs became aware that the defendants were in fact conducting an illegal business that is now referred to as Pyramid Investment Schemes or Ponzi Schemes. In his proposed defence, the 2nd defendant denied that the plaintiffs were entitled to be paid interest. I think that is a triable issue which will have to be determined by the court during the hearing of the case.

In the premises therefore, the defendants' application to set aside the ex-parte judgment entered on 13th February 2007 is hereby allowed. The said ex-parte judgment together with all the consequential orders issued thereto are set aside. The defendants are granted leave to file their defence. The said defence shall be filed and served within fourteen *(14)* days of today's date. The defendants shall pay to the plaintiffs thrown away costs which I have taken the liberty to assess at KShs.20,000/=. The said sum shall be paid within fourteen (14) days of today's date or in default thereof, the plaintiffs

shall be at liberty to execute. The defendants shall also pay the auctioneer charges. The said charges shall be agreed or taxed.

It is so ordered.

DATED at **NAIROBI** this **8th** day of **OCTOBER, 2008.**

L. KIMARU

JUDGE