



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

Civil Suit 1166 of 2002

KENYA COMMERCIAL BANK LIMITED.....PLAINTIFF

VERSUS

FAR EAST CARGO FORWARDERS LTD.....1ST DEFENDANT

JOSEPH MUIGAI WANENE.....2ND DEFENDANT

JEMIMAH M. MUIGAI.....3RD DEFENDANT

RULING

The 2nd defendant filed an application pursuant to the provisions of **Order IXA Rules 3, 10 and 11** of the **Civil Procedure Rules, Section 3A and 63(e)** of the **Civil Procedure Act** and **Section 9(1)** of the **Bankruptcy Act** seeking two orders from the court; He sought the setting aside of the ex-parte judgment entered against him together with all the consequential orders that may have been issued pursuant the said entry of judgment. He further sought to be granted leave to file a defence in accordance with the draft defence annexed to the affidavit in support of the application. The grounds in support of the application are on the face of the application. The 2nd defendant contends that he was not served with the summons to enter appearance. He complained that he was not served with the notice of the entry of judgment. He stated that the suit against him was incompetent, bad in law and fatally defective. He urged the court to allow the application since he would be prejudiced if the plaintiff is allowed to execute the default judgment.

The application is supported by the annexed affidavit of Joseph Muigai Wanene, the 2nd defendant. At the material part of the said affidavit, the 2nd defendant deponed as follows:

“10. That the plaintiff and/or its agents claim to have served me with summons to enter appearance but I cannot recall having been served with any court process relating to this suit.

11. THAT if at all I was served as claimed (which service I deny) then I must have been very busy and or absent minded at the time of service otherwise I could have stopped the proceedings there and then as my estate was in the hands of the official receiver pursuant to the receiving orders of this court.”

The application is opposed. John O. Ombuor, a Credit Analyst working for the plaintiff, swore a replying affidavit in opposition to the application. He deponed that the 2nd defendant was properly served with summons to enter appearance. He was of the view that the allegation made by the 2nd defendant to the effect that he was not served with summons to enter appearance was baseless and an afterthought. He

swore that the plaintiff was unaware that the court had issued a receiving order against the 2nd defendant at the time it filed the present suit against him. He deponed that in any event, the plaintiff sought an order rescinding the receiving order issued by the court in the bankruptcy proceedings. He was of the view that the 2nd defendant filed the present application in order to pre-empt the plaintiff's application seeking to rescind the receiving order. He deponed that the 2nd defendant failed to place any material before the court that could persuade the court to determine the application of setting aside the ex-parte judgment in his favour. He was of the view that the present application was an abuse of the due process of the court as the 2nd defendant was engaging in litigation while at the same time seeking to rely on the protection of a receiving order. He urged the court to dismiss the application with costs.

At the hearing of application, I heard the rival submissions made by Mr. Nyangena for the 2nd defendant and by Mr. Kamau for the plaintiff. Mr. Nyangena and Mr. Kamau basically reiterated the contents of the application and the affidavits filed by their clients in support of their respective opposing positions. The issue for determination by this court is whether the 2nd defendant established sufficient grounds to enable the court set aside the default judgment entered against him. The principles to be considered by this court in determining whether or not to set aside a default 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 justitiae* (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 default judgment, provided that in so doing, no injustice is occasioned to the opposing party. The discretion to set aside ex-parte judgment is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but is not designed to assist a 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 – Mugoria [1983] KLR 78**).

In the present application, the 2nd defendant stated that he was not served with summons to enter appearance. He deponed in the affidavit in support of his application that there was a probability that he was served with summons to enter appearance but due to the possibility that he was very busy and/or absent minded, he could not recall being served with the said summons to enter appearance. The plaintiff insists that the 2nd defendant was properly served with summons to enter appearance. I have perused the affidavit of service sworn by the process-server, Peter Kamau Muchina. The said affidavit was filed in court on 20th December 2002. In the said affidavit, he deponed that on 15th November 2002 at about 8.20 a.m., he served the 2nd defendant with summons to enter appearance at the 2nd defendant's business premises situated along Tom Mboya street, Nairobi. The process server stated that the 2nd defendant was trading under the business name Supertronics Enterprises. The 2nd defendant accepted and acknowledged service by signing on the reverse of the original. In the affidavit that the 2nd defendant swore in support of his application to set aside the ex-parte judgment, the 2nd defendant did not allude or address the facts that were deponed to by the process server in the said affidavit of service. Other than denying that he was served with summons to enter appearance, the 2nd defendant did not explain to the court why the process server made the claim that he had served him at his place of business.

My evaluation of the facts of this case clearly points to no other conclusion other than the fact that the 2nd defendant was duly and properly served with summons to enter appearance by the plaintiff. I think the 2nd defendant was less than candid when he claimed that he had not been served with summons to enter appearance. The 2nd defendant did not dispute the signature that the process server claimed was his at the reverse of the original of the summons to enter appearance which was filed in court. The 2nd defendant made no attempt to have the process-server summoned before court so that he could be cross-examined on the contents of the said affidavit of service. It is evident that the 2nd defendant was hoping against hope that the court would favourable consider his application upon overlooking the fact that he was actually served with summons to enter appearance. It is clear that the 2nd defendant was duly served with the summons to enter appearance. The 2nd defendant's claim that he was not served with the said summons to enter appearance is not based on facts. In fact, it was an exercise of peddling of falsehoods.

The entry of default judgment was therefore regular.

This court can still set aside the default judgment if it is satisfied that the defendant has sufficient grounds to entitle this court exercise its unfettered discretion and set aside the ex parte judgment. Several factors militate against this court setting aside the said ex-parte judgment. In the first instance, the 2nd defendant did not give any explanation why he delayed for a period of four years since becoming aware of the entry of ex-parte judgment before he filed the present application to set aside the ex parte judgment. It is also evident that the 2nd defendant has been less than candid in his conduct relating to the proceedings before court. The 2nd defendant, having been adjudged bankrupt upon his own application to this court which issued a receiving order on 31st May 2002, filed the present application without seeking the leave of the court.

It also appears that the 2nd defendant failed to notify the official receiver before he filed the present application. The 2nd defendant lacked capacity to bring the present application to court without enjoining the official receiver to the proceedings. It is apparent that the 2nd defendant was abusing the due process of this court when he filed the said application. The 2nd defendant was more than ready to move the court when it became apparent that the plaintiff intended to execute against him, while on the other hand the 2nd defendant was unwilling to disclose all his financial affairs, including the pending suits against him to the official receiver. This court did on 17th 1998 rescind the receiving order issued in the bankruptcy cause after it became apparent that the 2nd defendant was using the said receiving order as a shield against his creditors yet at the same time he was still incurring more debts by duping members of the public who were not aware of his bankrupt status.

The 2nd defendant placed no material before this court that would persuade me to exercise my unfettered discretion and set aside the ex-parte judgment. The 2nd defendant's application dated 6th July 2006, lacking in merit, is hereby dismissed with costs to the plaintiff. The default judgment entered by the deputy registrar was regular. There is no legal reason why the same should be set aside.

It is so ordered.

DATED at NAIROBI this 5th day of NOVEMBER, 2008.

L. KIMARU

JUDGE