



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

Civil Case No. 1794 of 1999

SOUTHERN CREDIT BANKING CORPORATION LTD.....PLAINTIFF

VERSUS

JONAH STEPHEN NGANGADEFENDANT

RULING

The defendant has moved this court by an application of a chamber summons brought under Order V Rule 16 and Order 1 X A Rule 10 and 11 of the Civil Procedure Rules.

The defendant seeks to set aside default judgment, which the defendant alleges was irregularly entered.

The defendant in his supporting affidavit stated that he came to know that judgment had been entered against him, in this matter, in favour of the plaintiff in March 2003, when he was informed that someone had attended his residence with a view to serve him with a notice to show cause.

That on inquiry being made by his advocate it transpired that he had been served with summons and plaint, apparently he had filed a Memorandum of appearance but no defence hence judgment was entered in default of a defence. That in February 2000 he had been served with a notice of entry of judgment and that service was done in Kyuna, in Nairobi.

The defendant has denied that he was ever served with the summons and plaint. He denied having filed a memorandum of appearance and denied that the signature appearing on the Memorandum of appearance was his signature. He denied also that he had been served with the notice of entry of judgment. The defendant then stated that he had never lived in Kyuna estate nor had he owned a plot in that estate stated to be plot NO. 234.

The defendant was able to prove, by production of his passport, that as at 17th January 2000 when he allegedly was served with the summons and plaint he was in Liberia and that at the time he was supposed to have been served with the notice of entry of judgment he was in the United Kingdom.

The defendant also obtained a handwriting expert report on the signature appearing on the memorandum of appearance. The handwriting expert compared that signature with the signature of the defendant on documents that were in the custody of the plaintiff. The expert concluded:

“I can find no agreement. The disputed signatures are written in totally different style which does not conform with the style of formation on the standard signature.....”

In other words the expert confirmed that the signature on the memorandum of appearance did not

conform to the defendant's standard signature. He concluded that:

“The disputed signatures are in my opinion simple forgeries.....”

The defendant relied on unreported authority case HCCC No. 241 of 1998 FIDELITY COMMERCIAL BANK LTD – VS – OWEN AMOS NDUNGU & ANOTHER. The facts are almost similar to the present case. In that case the court granted leave for substituted service through the newspapers, when indeed the defendant was out of the jurisdiction. Judgment was entered in default of appearance and on the application to set aside that judgment the court ruled:

“A distinction is drawn between regular and irregular judgments. Where summons to enter appearance has been served, and there is default in the entry of appearance, the exparte judgment entered in default is regular. But where ex parte judgment sought to be set aside is obtained either because there was no proper service or any service at all the summons to enter appearance, such a judgment is irregular, and the affected defendant is entitled to have it set aside as of right” per Hon Justice Njagi.

The plaintiff opposed the application and in submissions plaintiff's counsel began by distinguishing the present case and the authority relied upon by the defendant. In the authority counsel stated that the defendant did not file a memorandum of appearance where as in this case the defendant had filed an appearance. In the replying affidavit the plaintiff stated that that appearance was evidence that the defendant had been served with the summons and plaint. That on failing to file a defence judgment was entered in default. The plaintiff's legal officer deponed that the defendant's affidavit in support contained untruths.

Indeed principles of setting aside exparte judgment are very clear. If the judgement is regular the court is vested with unfettered discretion to set aside such judgment on such terms are just. If the judgement entered is found to be irregular it ought to be set aside ex debito justitiae.

The court in this matter ought to examine the facts on the ground to determine if the judgement was or was not regular.

The defendant has denied being served with the summons and plaint. It is curious that there is no record of an affidavit of service of summons. The plaintiff indeed obtained judgment on the basis that the defendant filed a memorandum of appearance but failed to file a defence. That memorandum of appearance was denied by the defendant and that denial was supported by a handwriting expert. The court also looked at the signatures on documents from the plaintiff, which had been signed by the defendant, and compared them with the one on the appearance and indeed the signatures bare no resemblance at all. The nagging question is why did the plaintiff not furnish the court with that affidavit of service.

The court accepts the defendant's contention that both when the summons and the notice of entry of judgment were allegedly served he was out of the country. His passport supports that contention.

It is surprising that faced with that evidence the plaintiff failed to rebut it. Instead the plaintiff stated that the defendant's affidavit contained untruths.

I find that the judgement entered herein against the defendant was irregular and the defendant is entitled to the order to set it aside as of right.

The proposed defence filed by the defendant denies that he obtained a loan but that rather that he obtained an overdraft. The plaintiff's claim is that the defendant was granted a loan. That I believe is a defence that ought to be allowed to go to trial for indeed it is possible that the rate of interest in respect of loan is different in respect of an over draft.

The orders of this court are: -

- (1) That the judgment entered hereof against the defendant in default of defence, on 16th February 2000 be and hereby set aside.**
- (2) That the defendant is granted leave to file within 14 days from this date hereof, a defence to the plaintiff's claim.**
- (3) That the costs of the chamber summons dated 9th April 2003 are awarded to the defendant.**

Dated and delivered this 29th day of March 2006

MARY KASANGO

JUDGE