REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1166 of 2002

KENYA COMMERCIAL BANK LTD…….……
PLAINTIFF

VERSUS

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

JOSEPH MUIGAI WANENE…….……2ND DEFENDANT

JEMIMA M. MUIGAI…….……..3RD DEFENDANT

R U L I N G

This is an application by the 3rd defendant, who is seeking to set aside judgement which had been entered against her, after she had failed to Enter Appearance. The applicant also seeks an order for stay of execution pending the setting aside of the default judgement.

In nutshell, the applicant is saying that she was never served with the Plaint or Summons to Enter Appearance. Therefore, she submits that the judgement against her was irregular, and should therefore be set aside as a matter of right.

The other contention raised by the applicant is that, if the court should hold the view that the judgement against her was regular, the same should nonetheless be set aside, as the applicant has a good defence to the claims against her. It was the applicant's submission that this court has an unfettered discretion to set aside the judgement, even if it was deemed to be regular.

In support of the application, the applicant filed an affidavit. In that affidavit she said that no summons to Enter Appearance were ever served upon her. It is her case that there was an affidavit of service which confirms that she was not served.

I have perused the said affidavit of service which was sworn by Mr. Peter Kamau Muchina on 18th November 2002. The process server deponed that when he received the Summons to Enter Appearance, which were directed to the 3rd defendant, he first established that she was the legal wife of the 2nd defendant. He also verified that the 3rd defendant used to assist in operating a company known as Supertronics Enterprises, which was situated along Tom Mboya Street Nairobi.

The process server visited the business (Supertronics Enterprises) on 13th and 14th November 2002. On both occasions, he failed to find the 3rd defendant.

When he next visited the business, on 15th November 2002, the process server effected service on the 2nd defendant in his capacity as the "**legal husband**" of the 3rd defendant, who resided with the latter in the same house. According to the process server, the 2nd defendant informed him that he had authority to accept any documents on behalf of the 3rd defendant.

However, in her affidavit in support of the application now before court, the 3rd defendant deponed that she had never authorised her husband to accept service on her behalf. Not only that, but she also emphasises that she and the 2nd defendant had encountered marital differences, which led to her moving out of the matrimonial home. According to the applicant, she had to stay at a rental house for several months, until some close family friends and relatives reconciled her with her husband.

In those circumstances, the applicant reiterates that she did not receive the Summons to Enter Appearance, even if the same had actually been served on her husband. She says that at the material time, she and the husband were not on talking terms.

Finally, the applicant insists that she has a good defence, as she does not owe any money to the plaintiff.

In an endeavour to demonstrate the strength of her defence, the applicant drew the court's attention to paragraph 11 of the Plaint, whereat it is pleaded the plaintiff only called upon the 1st and 2nd defendants to pay the amount allegedly owed by the defendants. Therefore, it is submitted, by the applicant, that that pleading clearly backs her contention that the plaintiff never notified her of the default, if any, by the 1st defendant .

In the face of the applicant's submissions, the plaintiff accused the applicant of being untruthful. The reason for that statement is that whilst the applicant had alleged that she first became aware of this case only when served with a Notice To Show Cause why she should not be arrested and committed to civil jail, the applicant had been served with a Notice of interlocutory judgement.

The said notice is dated 7th May 2003 and is said to have been served upon the applicant through registered post. The postal address cited on the notice is P. O. Box 28745 NAIROBI.

As that is also the postal address used by the applicant in her supporting affidavit, the plaintiff is convinced that the applicant had been duly served. In further support of the said service, the plaintiff exhibited a copy of the "**certificate of posting a registered postal article."**

Secondly, the plaintiff submitted that Summons could be served on an adult member of the family of the person to be served. Therefore, as far as the plaintiff was concerned, service had been effected properly, once the Summons were served upon the applicant's husband.

It is contended that the applicant ought not to be believed, when she said that at the material time, she was staying in a rental house, away from the matrimonial home, as she did not produce rent receipts to support her assertion.

The plaintiff also asserted that the applicant had no defence to the plaintiff's claim, as she had executed a guarantee, and also because she had been served with two notices dated 6/2/97 and 19/4/02, respectively. Copies of the guarantee, and the notices were exhibited.

Having given due consideration to this matter, I note that the postal address to which the plaintiff sent the notice of interlocutory judgement was the same as the one used by the applicant in her affidavit. Therefore, it is more probable than not that the applicant did get information about the suit prior to the

time when she was served with the Notice to Show Cause. The necessary inference to be drawn from that is that the applicant was perhaps not so very transparent.

However, that notwithstanding, it would be impossible to alter the fact that by his own admission, the process server did not effect service upon the applicant. The Summons were served on the applicant's husband.

Order 5 rule 9 (1) of the Civil Procedure Rules provides as follows:

"**Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient."**

In this case, the applicant has deponed that her husband had no authority to accept service on her behalf. Indeed as the two were living separately at the time, following marital disagreement, the husband was unlikely, in my considered view, to have been empowered to accept service on the applicant's behalf.

Furthermore, following the applicant's deposition, I hold the view that in order for the service to have been deemed as valid, the plaintiff should have demonstrated that the applicant's husband was empowered to accept service on her behalf. The plaintiff did not make any effort to disprove the applicant's contention that her husband did not have authority to accept service on her behalf. Therefore, I am unable to find that the husband was her "**agent empowered to accept service"**, as envisaged by Order 5 rule 9 (1) of the Civil Procedure Rules.

Meanwhile, if service on the applicant's husband was deemed to be proper by virtue of Order 5 rule 12 of the Civil Procedure Rules, one has got to give consideration to that rule too. It reads as follows:

"**where in any suit the defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on any adult member of the family of the defendant who is residing with him."**

As the process server says that he visited the business on two consecutive days, before serving the Summons on the applicant's husband, it is necessary to assess whether or not the process server had established that "**the defendant cannot be found,";** for it is only in those circumstances that service may be effected on the defendant's agent or an adult member of her family.

From the facts before me, as laid out by the process server, I am not satisfied that two visits to the place of business, on consecutive days was sufficient effort from which one could conclude that the applicant could not be found.

It is noteworthy that on 13th November 2002, the process server was told that the applicant had not yet reported, and was not expected that day. On the next day, the process server says that the applicant was said to be away on other commitments.

From those two episodes, the only conclusion that can be drawn is that the process server only searched for the applicant at Supertronics Enterprises, Tom Mboya Street Nairobi. The process server did not disclose his efforts in tracing the applicant at home or elsewhere. Therefore, just because the applicant did not turn up at the business on 13th November 2002, and was away on other commitments on 4th November 2002, would not be adequate reason to conclude that she could not be found.

Accordingly, I find that there was no service or no proper service on the applicant.

In **REMCO LTD V. MISTRY JAVDA PARBAT & CO. & 2 OTHERS HCCC NO. 171 of 2001**, the HON. RINGERA J. (as he then was) held as follows:

"**I begin by stating the applicable law as I understand it. First, if there is no proper or any service of the summons to enter appearance to the suit, the resulting default judgement is an irregular one**

which the court must set aside ex debito justitiae (as a matter of right) on an application by the defendant. Such a judgement is not set aside in exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself."

In this case, I have come to the conclusion that the applicant was not properly served. Consequently, the judgment which was entered against her in default of appearance was irregular, and it must therefore be set aside.

However, if I were wrong as regards the issue of service, I would nonetheless still order that the judgement be set aside, as I hold the view that the 3rd defendant has an arguable defence. In arriving at that conclusion, I have taken into account the two notices which the plaintiff served upon the applicant on 6th February 1997 and 19th April 2002. I have also taken into account the guarantee executed by the applicant. Although I possess no expertise in verification of signatures, in my comparison of the signatures on the applicant's affidavit and the one in the guarantee, there is a marked difference. Therefore, although the plaintiff did exhibit the guarantee document allegedly executed by the applicant, I am unable to speculate as to the reasons why the applicant denies entering into an agreement of a continuing guarantee and indemnity with the plaintiff.

Is the applicant going to put forward other reasons for her assertion that she did not enter into the agreement with the plaintiff? I do not know. But, I cannot write-off the defence whose draft was annexed to the application.

In conclusion, I find merit in the application dated 19th September 2005. Therefore, the judgment which was entered herein against the 3rd Defendant, on 17th January 2003, is hereby set aside, with costs to the applicant.

The 3rd Defendant is directed to file and serve her defence within the next fifteen (15) days from today.

Dated and Delivered at Nairobi this 27th day of June 2006.

FRED A. OCHIENG

JUDGE