

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

Civil Suit 425 of 2005

NATIONAL BANK OF KENYA.....PLAINTIFF

VERSUS

ISAAC NGIGE NJOROGE T/A GOODHOPE SERVICE STATION....DEFENDANT

RULING

The defendant by a Chamber Summons dated 13th October 2006 seeks to set aside the interlocutory judgment entered against it and seeks the leave of court to file a defence out of time. The defendant by the affidavit in support of that application stated that he first came to know of this suit through a letter he received dated 2nd October 2006 which letter was notifying him of the entry of judgment against him. On receipt of that letter he forwarded it to his advocate who on making inquiry found that judgment had been entered against him in default of an appearance. The court file indicated that on the 24th April 2006 he had been served with a summons and plaint. The defendant admitted that he is aware of the facts surrounding this case because he has held various meetings with the plaintiff and has corresponded on the matter but he stated that he was not served with the summons and plaint. He stated that on 24th of April 2006 he attended his doctor, Doctor Omondi Oyoo. He exhibited as evidence of such attendance a receipt issued to him for the payment made to the said doctor for consultations. He stated on that day he went to the doctor's surgery but was unable to see the doctor until 3.30 pm because the doctor was not in his office. He therefore denied that he was served as stated in the affidavit of service. Additionally he said that the loan granted by the plaintiff was granted to an entity called Good Hope Service Station. That that service station is owned by Kenya Star Enterprises Ltd. He admitted that he is a director of the Kenya Star Enterprises Ltd. He therefore was of the view that he was not rightly sued in this matter. He annexed the proposed defence where he has pleaded as stated herein before that he is wrongly sued. He also stated that he sold a property and the proceeds of that sale were used to clear the indebtedness of Good Hope Service Station he therefore also denied that Good Hope Service Station is indebted to the plaintiff because the sale of the property cleared the amount outstanding in its account.

The plaintiff opposed the defendant's application. The affidavit in reply stated that the plaintiff was not aware that the defendant is not an agent of **Good Hope Service Station**. That the plaintiff had allowed the defendant to sell the property by private treaty which was security for the loan issued. It was stated that the plaintiff did not at any time waive its rights to recover the balance of the outstanding amount after giving credit for the sale proceeds. Accordingly that is why the present suit was instituted and that the defendant was served with the summons and plaint as indicated in the affidavit of service. The deponent stated that the defendant had merely failed to file an appearance as required and had moved by the present application because of his apprehension of inevitable execution.

I have considered the arguments brought before court and it is clear that the defendant denied being served with the summons and plaints. In so denying the defendant clearly showed that on the material date that the process server has deponed to have served at his home he was seeing his doctor. The plaintiff did not at all respond to that statement by the defendant. All the plaintiff did was to blame the defendant for not filing a Memorandum of Appearance and stated that the present application was made to obviate the likelihood of execution.

I am of the view that the plaintiff ought to have done much more in respect of the defendant's statement that he was not served. It was open to the plaintiff to carry out investigations and to confirm whether indeed the receipt annexed to the defendant's application was genuine and whether indeed the second

defendant did attend to his doctor. The plaintiff could also have brought at the hearing the process server for cross-examination. Having failed to do so the court finds that there is no proof that the defendant was served as claimed. Having made that finding the defendant as of right would be entitled to setting aside of the ex parte judgment entered in default of an appearance. The court would not have discretion in regard to that setting aside where it finds that there is no sufficient evidence of service on the defendant. It is important to note that the affidavit of service indicated that the defendant declined to sign for the summons. Since there is no evidence of signature and since the plaintiff has not displaced the submissions of the defendant in respect of service this court will indeed set aside the ex parte judgment. The court has perused the defendant's proposed defence and the court finds that the defendant has raised an issue which perhaps ought to be considered a trial. The defendant has said that he is wrongly sued because the debt was incurred by **Good Hope Service Station** which entity is owned by Limited Liability Company. That in the court's mind is central to be investigated whether indeed the defendant is wrongly sued. It ought to be remembered that it is accepted as a principle in cases of setting aside ex parte judgment that such setting aside should be in order to avoid injustice or hardship. The court therefore grants the defendant the following orders:-

- 1) **That the ex parte judgment entered herein against the defendant is hereby set aside.**
- 2) **The defendant is granted 14 days from this date hereof to file and serve defence.**
- 3) **The defendant is granted costs of the Chamber Summons dated 13th October 2006.**

Dated and delivered this 28th day of November 2006.

MARY KASANGO

JUDGE