REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION – MILIMANI
CIVIL CASE 645 OF 2004

YUSUF ABDI ……PLAINTIFF

VERSUS

KENYA POWER & LIGHTING COMPANYLTD .....DEFENDANT

RULING

I have two applications before me. The first Application is dated 25.5.2005 and was filed on 26.5.2005. It is expressed to be brought under Order 5 Rule 9 (2) Order 9A Rules 10 and 11 of the Civil Procedure Rules and the inherent power of the Court. It seeks two primary Orders:

1. The 1st Defendant be granted a stay of execution of the judgment entered on 20.5.2005 pending the hearing and determination of this application.

2. The judgment entered by the Court on 20.5.2005 be set aside.

The second application is dated 6.7.2005 and was filed on 7.7.2005. This application was partly heard by Njagi J. who dealt with prayers 1,2,3 and 4. The primary prayer left for determination is prayer 5 which is as follows:

5. ***The summons to enter appearance dated 21.6.2005 be struck out*.**

Both applications are by the Defendant.

The application dated 25.5.2005 is based on the following grounds:-

1. **That the affidavit of service regarding the service of the summons to enter appearance on the first Defendant sworn on 25.4.2005 is defective in that it does not state the firm of Ongoto & Company had instructions to accept service and enter appearance to the summons nor does it state that Ongoto and Company accepted delivery.**

2. **That service purports to have been made on an advocate under Order 5 Rule 9 (2) of the Civil Procedure Rules. The Court has no jurisdiction to enter judgment in default where the request for judgment is based on delivery of the summons to enter appearance to an advocate under Order 5 Rule 9 (2).**

3. **That the judgment which was entered on 20.5.2005 was based on alleged service of summons and the plaint on 20.8.2001 but the judgment is for the amount in an Amended plaint that had not even been filed at the time of such alleged service.**

4. **That the summons to enter appearance have never been served on the first Defendant.**

5. **That the 1st Defendant was not aware of the judgment until it was served with a notice of entry of judgment on 23.5.2005 requesting that the decretal sum of Kshs 143,881,940/= be paid within 10 days failure to which execution will issue.**

The application is supported by an affidavit of one Edna Mugaa an advocate employed by the firm of Hamilton Harrison & Mathews Advocates. There was reliance placed upon affidavits by Beatrice Muendo the Chief Legal Officer of the Defendant, Alfred Nyagaka Ongoto the proprietor of the firm of Ongoto and Company Advocates, Lucy Karanja Legal Officer with the Defendant at the material time and Allan Owiti another Legal Officer of the Defendant.

The application is opposed. There is a replying affidavit sworn by Yusuf Ali Abdi – the Plaintiff who has also sworn a further affidavit. Counsel for the Plaintiff has also filed Grounds of Opposition and placed reliance upon the same.

The second application is based on the following primary grounds:

1. That there exists a default judgment against the Defendant entered on 20.5.2005 by the Deputy Registrar on the purported service of summons in August 2001 pursuant to a request for judgment filed on 20.5.2005.

2. That there is a pending application challenging the default judgment on the basis that the service of summons was not effected.

3. That there is a pending application to have the suit dismissed on the basis that summons were never served since the filing of the plaint on 13.8.2001.

4. That no new summons can be issued once a purported judgment exists.

5. That no application for enlargement of validity of summons was made or could have been allowed pursuant to Order 5 Rule 1 of the Civil Procedure Rules.

6. **That the original summons having expired and no application made within 24 months** of **13.8.2001, no summons could be issued**.

The application is supported by an affidavit of one Beatrice Muendo the Defendant's Chief Legal Officer. This application is also opposed and there are Grounds of Opposition filed by Counsel for the Plaintiff.

The applications were canvassed before me on 7.10.2005 by Mr. Gitonga, Learned Counsel for the Plaintiff. Counsel for the Defendant adopted the averments in the affidavits of Edna Mugaa, Beatrice Muendo, Alfred Nyagaka Ongoto, Lucy Karanja and Allan Owiti. Counsel reiterated what was contained in the said affidavits and on the basis thereof argued that summons to enter appearance had not been served and that even if the same are deemed to have been served, the service was upon a firm of advocates and a default judgment could not have been entered against he Defendant. Counsel impugned the affidavits of service relied upon by the Plaintiff in seeking interlocutory judgment. He emphasized that the official allegedly served was unknown to the Defendant.

In the alternative it was argued for the Defendant that even if the default judgment was deemed a regular judgment, the defendant's proposed defence raises numerous issues that should go to trial and the Court's discretion should be exercised in favour of the Defendants and set aside the default judgment.

With respect to the application dated 6.7.2005, Counsel for the Defendant argued that if

summons to enter Appearance was issued in 2001 its validity expired 12 months thereafter. Consequently, the default judgment entered on the basis of the amended plaint is invalid and the summons to enter appearance issued without being validated by the Court is null and void and should be struck out and if struck out the suit should be dismissed as the same has abated.

With respect to the Court's discretion, Counsel submitted that the same is free. Reliance was placed upon the following cases for this proposition.

(a) *SHAH –V- MBOGO & ANOTHER (1967) E.A. 116*

(b) *PATEL –V- E.A. CARGO HANDLING SERVICES (1974) E.A. 75*

(c) *LANKIN ENTERPRISES –V- KP & LCO: HCCC NO. 2632 OF 1974 (UR)*

(d) *GANDHI BROTHERS –V- H.K. NJAGE T/A H.K. ENTERPRISES: HCCC NO. 1330 OF 2001 (UR)*

With respect to the summons to enter appearance having expired and the suit thereby being rendered null and void, reliance was placed upon the case of UDAYKUMAR CHANDULAL RAJANI & OTHERS –V- CHARLES THAITHI: C.A. NO.85 OF 1996 (UR): The Court of Appeal held:

"Order V. Rule 1 provides a comprehensive code for the duration and renewal of summons and therefore the non-compliance with the procedural aspect caused by failure to renew the summons under this rule is such a fundamental defect in the proceedings that the inherent powers of the Court under Section 3A of the Civil Procedure Act cannot cure."

In response to the submissions made on behalf of the Defendant, Counsel for the Plaintiff restated the position taken by the Plaintiff in his replying affidavit and further affidavit. Counsel maintained that Counsel for the Defendant had no excuse for the failure to file defence to the amended Plaint because they had been served with the amended plaint. In Counsel's view therefore, the judgment entered against the Defendant was a regular judgment.

With respect to the summons issued on 16.8.2001, Counsel submitted that the same had been issued after an interlocutory injunction had been served and the Defendant participated in the proceedings and therefore had ample opportunity to file its defence. Indeed according to Counsel, an order in the injunction application to the effect that the case proceeds to full hearing settled the issue of service of summons to enter appearance.

With respect to the proposed defence it was Counsel's argument that the same does not raise any triable issues and the Court's discretion should not be exercised in favour of the Defendant.

With respect to the exparte stay of execution, Counsel submitted that the same had been granted without jurisdiction as the Defendant had disobeyed previous Court orders and had obstructed the cause of justice.

Reliance was placed upon numerous authorities for various propositions some of which are not quite relevant to the matter at hand. I will refer to some of the authorities where appropriate.

In NANJIBHAI PRABHUDAS & CO. LTD –V- STANDARD BANK LTD (1968) E.A.670, the Court of Appeal held *inter alia*

"*even if the service of summons was defective, the defect constituted an irregularity capable of being waived and did not render the service a nullity."*

Service had in this case been effected out of jurisdiction and appearance had been entered.

In MAINA –V- MUGIRIA (1983) KLR 78 the Court of Appeal held *inter alia* that the defence should be considered in determining an application to set aside a default judgment. In Counsel's view, there is no defence to the Plaintiff's claim and the application should be dismissed.

The decision in KINGSWAY TYRES & AUTOMART LTD –V- RAFIKI ENTERPRISES LTD: C.A. NO. 220 of 1995 was cited for the proposition that where there has been a valid service the resultant judgment is regular and may only be set aside if the Defendant shows he has a reasonable defence on the merit which according to Counsel for the Plaintiff is not the case here.

I have considered the applications. I have also considered the original plaint and the amended plaint. I have further considered the rival submissions of Counsel. Finally I have considered the relevant authorities relied upon by Counsel. Having done so, I have the following view of the matter. The issues that fall to be decided are: Firstly, whether or not the default judgment entered herein should be set aside as a matter of right. Secondly, whether if the same is not set aside as of right, it should be set aside or varied in the exercise of the Courts unfettered discretion.

With respect to the first issue, I have to consider whether the default judgment was irregularly obtained. If it was so obtained in default of appearance or defence it will be set aside as a matter of right. How was service effected in the case at hand. The original plaint, was filed in the Chief Magistrate's Court on 13.8.2001 as Civil case No.5741 of 2001. This suit did not have a prayer for special damages. On 15.8.2001 Lucy Karanja Advocate filed her notice of appointment for the 1st Defendant. On 16.8.2001 M/S Ongoto and Company Advocates filed a Notice of Change of Advocates taking over the matter from Lucy Karanja Advocate.

The case was subsequently transferred to the High Court. The Defendant appointed Murage & Mwangi Advocates on 3.12.2004 in place of Ongoto & Company Advocates. Shortly afterwards on 6.4.2005 M/S Hamilton Harrison and Mathews filed their Notice of Change of Advocates.

On 4.5.2005 the Plaintiff filed an amended Plaint which *inter alia* sought judgment for special damages of shs 143,881,940/=. Shortly thereafter the Plaintiff on 20.5.2005 requested for interlocutory judgment for the said sum of Kshs 143,881,940/= in default of appearance and defence. There are three affidavits of service sworn by one Nzuki Musyoki a Court Process Server. The first affidavit of service was sworn on 20.8.2001. The process server deponed *inter alia* that he served summons to enter appearance upon one Thuiba an officer at the Legal Department of the Defendant on 14.8.2001 whom he had served with an application on 13.8.2001. He further deponed that he was informed by the said Thuiba to serve the firm of Ongoto and Company Advocates who had been instructed by the Defendant. The process server left a copy of the summons to enter appearance and plaint with the said Thuiba who refused to sign the process server's copies. He further deponed that when he returned to the offices of the Plaintiff's Advocates, he was instructed to serve the said documents upon the firm of M/S Ongoto and Company Advocates.

The second affidavit of service was sworn on 25.4.2005. The process server deponed *inter alia* that on 20.8.2001 he was instructed by Counsel for the Plaintiff to serve summons to enter appearance dated 16.8.2001 upon the firm of Ongoto and Company Advocates. He further deponed that he effected service upon the Secretary in the said firm of Advocates who declined to acknowledge the same on the grounds that Mr. Ongoto Advocate was not in the office at the time. He then left all copies of the documents with the Secretary for them to be acknowledged by Mr. Ongoto. He also deponed that he made up to 5 visits to the offices of the said firm of Advocates and at the end of the day retrieved copies of the summons to enter appearance and

plaint unstamped by the firm of M/S Ongoto and Company Advocates.

The third affidavit of service was sworn on 6.5.2005. The process server deponed that on 5.5.2005 he served M/S Hamilton Harrison and Mathews with an amended plaint dated 2.5.2005.

It appears that on the basis of the above affidavits of service the Deputy Registrar entered interlocutory judgment for the Plaintiff on 20.5.2005. Then on 21.6.2005 fresh summons to enter appearance were issued in this suit and the same process server Nzuki Musyoki was instructed to serve the same together with the amended plaint of 2.5.2005 upon the Defendant. The process server deponed that he handed the said documents to the Secretary of the Defendant who in turn handed them to Mr. Owiti. Mr. Owiti instructed the process server to serve the firm of M/S Hamilton Harrison and Mathews Advocates with the said documents. The process server deponed that Mr. Owiti refused to either stamp the documents or sign any of them.

The Defendant has denied being served with summons to enter appearance. There is the affidavit of Lucy Karanja sworn on 16.6.2005. She depones in this affidavit *inter alia* that on 14.8.2001, she was served with a Chamber Summons dated 13.8.2001 and she acknowledged the same by signing on the reverse of the last page. She depones that she was not served with any summons to enter appearance on behalf of the Defendant. She also depones that at the time of the service, the Defendant did not have an employee by the name of Thuiba. On being served with the said application she instructed M/S Ongoto and company Advocates to take over the conduct of the application on behalf of the Defendant. She further denied that she instructed the process server to serve summons to enter appearance upon the firm of Ongoto and Company Advocates.

Alfred Nyagaka Ongoto has sworn an affidavit to the effect that when his firm was instructed by the Defendant the Defendant had not been served with summons to enter appearance. He was not also served with summons to enter appearance and indeed on 6.2.2002 informed the Defendant that the Plaintiff had not taken out summons to enter appearance.

There is also the affidavit of Beatrice Muendo the Chief Legal Officer of the Defendant. In her affidavit sworn on 16.6.2005, she deponed that since her employment by the Defendant in 1996 to date, the Defendant has never had an employee by the name of Thuiba referred to in the replying affidavit of the Plaintiff. He further deponed that the Defendant was not served with summons to enter appearance.

The process server was not called to be cross examined upon his affidavits of service. From the material availed, however, I have found that the purported service upon one Thuiba an officer at the Legal Department of the Defendant was not valid service upon the Defendant. This is because I have come to the conclusion that no such person was employed by the Defendant at the time of the alleged service of summons to enter appearance on 20.8.2001. The process server or the Plaintiff has not adequately rebutted the averments that as at the time of service of the said summons to enter appearance or at all the Defendant did not have an employee known by the name Thuiba. Secondly, the process server in his affidavit of service sworn on 20.8.2001 did not give the rank of the said Thuiba. He described him as an officer at the Legal Department of the Defendant. There is no averment by the process server that the said Thuiba was a principal officer of the Defendant in terms of Order V Rule 2 (a) of the Civil Procedure Rules.

Mr. Alfred Nyagaka Ongoto who is alleged to have been served with summons to enter appearance on the instructions of the purported Thuiba, categorically denied being so served and since I have found that no such person existed in the employment of the Defendant at the time of the alleged service, the inevitable conclusion is that no summons to enter appearance was served upon the firm of M/S Ongoto and Company Advocates.

Having found that there was non-service of summons to enter appearance with respect to the summons dated 16.8.2001 no valid judgment could be entered for the Plaintiff against the Defendant based upon the said summons to enter appearance.

The Plaintiff filed an amended Plaint on 4.5.2005. This amended plaint was served upon M/S Hamilton Harrison and Mathews on 5.5.2005. By this time the Defendant had filed its Notice of Motion dated 21.4.2005 seeking dismissal of the suit on the grounds *inter alia* that the Plaintiff had not taken out summons to enter appearance since filing suit on 13.8.2001 and no application for extension of the validity of summons to enter appearance or the time within which to file the summons to enter appearance had been filed. This application did not prevent the Plaintiff from seeking and obtaining interlocutory judgment against the Defendant upon the Defendant's failure to appear or file defence. No fresh summons to enter appearance had been issued at the time the interlocutory judgment was obtained. In fact fresh summons to enter appearance were subsequently issued on 21.6.2005 and served upon the Defendant on 24.6.2005 along with the amended plaint. The Plaintiff's reason for the fresh summons to enter appearance was that the effect of the transfer of CMCCC No.5741 of 2001 to this Court and the filing of the amended plaint on 4.5.2005 constituted a new suit and consequently there was no requirement for an application for the extension of the validity of summons. I wonder why the Plaintiff would want to treat this suit as a fresh suit obtain fresh summons to enter appearance when in fact he has already obtained interlocutory judgment in the new suit. How could judgment be entered in default of appearance and defence even before service of the summons to enter appearance?.

In my view a judgment entered in default of appearance and defence even before the issuance of summons to enter appearance and service thereof cannot be a valid judgment. Further the sums for which interlocutory judgment was sought were sums which were not in the original plaint but in the amended plaint. Judgment could therefore not be entered on the basis of the purported service of the original summons to enter appearance.

The upshot of this matter is that the interlocutory judgment entered herein in default of appearance and defence is an irregular judgment. The Court cannot countenance an irregular judgment on its record. The same is for setting aside *ex debito justitiae*. In this event a consideration of the merits of the defence would be unnecessary.

However, if I were to consider whether or not had this judgment been regular I would have exercised my discretion to set it aside I think I would have had no hesitation in exercising my said discretion in favour of the Defendant. In my view the proposed defence annexed to the further affidavit of Beatrice Muendo aforesaid sworn on 16.6.2005 raises several *bona fide* issues that should go to trial such as the status of the relationship between the Plaintiff and the Defendant; whether or not there was any contract between the Plaintiff and the Defendant with respect to the supply of electricity; the illegality or unlawfulness or otherwise of the initial connection of electricity supply. What was the role of the M/S Kenya Cold Storage (Foods) Ltd etc.

I turn now to the Defendant's application for an order that the summons to enter appearance dated 21.6.2005 be struck out primarily for the reason that since the original summons were issued on 13.8.2001 and not having been served within 24 months have expired. Under Order V rule 1 (1) (a) a summons (other than a concurrent summons) is valid in the first instance of 12 months beginning with the date of its issue. The summons to enter appearance in this case having been issued on 16.8.2001 was valid up to 15.8.2002 and its validity could have been extended by the Court under Rule 1 (2) of Order V of the Civil Procedure Rules. Under Order V Rule 1 (7) of the Civil Procedure Rules where no applications has been made under sub rule (2) of the same rule the Court may without notice dismiss the suit at the expiry of 24 months from the issue of the original summons. The Court therefore could have dismissed this suit at the expiry of 24 months from 16.8.2001 as no application for extension of the validity of the summons was made. This sub-rule is however permissive. The Court therefore has a

discretion in the matter. In the case at hand right from the institution of the suit both parties have participated in the various interlocutory applications that have been filed. The Defendant has been aware of the suit even though I have found that it was not served with summons to enter appearance. It will therefore not suffer prejudice if this suit is maintained and it is allowed to put forward its side of the case. It will therefore serve the ends of justice if the summons given on 16.8.2001 are deemed valid and this case does proceed in the normal way.

In the end the orders of the Curt are that:

(a) The interlocutory judgment entered on 20.5.2005 is hereby set aside.

(b) The summons issued on 16.8.2001 are deemed valid.

(c) The Defendant is granted unconditional leave to defend and the draft defence annexed to the affidavit of Beatrice Muendo of 16.6.2005 will be deemed duly filed and served on payment of the requisite Court fees.

(d) The summons to enter appearance dated 21.6.2005 is struck out.

(e) Costs shall be in the cause.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER, 2005.

F. AZANGALALA

JUDGE

Read in the presence of:-

Kiragu H/B for Gitonga for the Defendant and

Omolo for the Plaintiff.

F. AZANGALALA

JUDGE